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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ROBERT M. SCHMIDT AND RICHARD A. MASSMAN, CO-TRUSTEES OF THE LEON A. SCHMIDT CHILDREN'S TRUST NO. 1,
Petitioners,

v.

STATE OF TEXAS AND CITY OF AUSTIN,
Respondents.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE STATE OF TEXAS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Is the measure of compensation due for the taking of property under the Constitution's Fifth Amendment the value which would be negotiated for the sale of the property in a open market transaction between private parties?

Does the Constitution's Fourteenth Amendment permit the measure of just compensation due for the taking of property to differ among classes of condemnees dependent not on the damage sustained, but on the nature and extent of the public project involved?

LIST OF PARTIES

The parties to the proceeding below were: the Petitioners, Robert M. Schmidt and Richard A. Massman, Co-Trustees of the Leon A. Schmidt Children's Trust No. 1; Austex, Ltd., a Nevada Corporation, which has filed a separate Petition for Writ of Certiorari; and the Respondents, the State of Texas and the City of Austin.

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No._____

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ROBERT M. SCHMIDT AND RICHARD A. MASSMAN, CO-TRUSTEES OF THE LEON A. SCHMIDT CHILDREN'S TRUST NO. 1,

Petitioners,

v.

STATE OF TEXAS AND CITY OF AUSTIN,

Respondents.

Petition for Writ of Certiorari

The Petitioners, Robert M. Schmidt and Richard A. Massman, Co-Trustees of the Leon A. Schmidt Children's Trust No. 1, respectfully pray that a writ of certiorari issue to review the October 27, 1993, judgment and opinion of the Texas Supreme Court, and the February 2, 1994, overruling of the Motion for Rehearing, in the above-captioned proceeding.

OPINIONS BELOW

The opinion and judgment of the Texas Supreme Court on October 27, 1993, is reported at 867 S.W.2d 769 (Tex. 1993), and is reprinted in the appendix hereto, at A-4 to A-42, *infra*.

The Texas Supreme Court overruled the Petitioners' Motion for Rehearing on February 2, 1994, without opinion. 37 Tex. Sup. Ct. J. 425, 427 (Feb. 2, 1994).

The Texas Supreme Court reversed and rendered the trial court judgment and the opinion and judgment of the Third District Court of Appeals at Austin, the latter reported at 805 S.W.2d 25 (Tex.App.--Austin, 1991), and reprinted in the appendix hereto, at A-43 to A-73, *infra*.

STATEMENT OF JURISDICTION

Petitioners seek review from the opinion and judgment of the Texas Supreme Court of October 27, 1993. Petitioners' subsequent Motion for Rehearing was overruled on February 2, 1994. The Supreme Court has jurisdiction to review such cases from state courts by virtue of 28 U.S.C. §1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part that "private property [shall not] be taken for public use without just compensation."

The Fourteenth Amendment to the United States Constitution provides in pertinent part that "No State shall...deny to any person within its jurisdiction the equal protection of the laws."

This is a statutory eminent domain action initiated by Respondents under Chapter 21 of the Texas Property Code. Sections 21.041 and 21.042, which prescribe the evidentiary parameters and the measure of damages in such condemnation actions, are set forth in the appendix hereto, at A-1 to A-3, *infra*.

STATEMENT OF THE CASE

Respondents sought in this statutory eminent domain action to acquire a portion of the Petitioners' property to widen and change the character of an abutting street, converting it from a two-way at-grade roadway with median cuts into a controlled access main lane freeway with one-way frontage roads on both sides which abut and provide access to adjoining tracts.

The Petitioners' property, before the taking, was one of the best locations in Austin for first class, national tenant retail use and was leased by national chain stores. The property

remaining, after the taking, was good only for a secondary and inferior retail use and is now occupied by a pawn shop.

As a result of the project giving rise to the taking, the property was and is subject to intense construction activity including the installation and relocations of utilities, and construction of new frontage roads and new elevated main lanes. The construction activity was to occur in waves in front of the remaining property for almost four years and involved numerous pieces of heavy equipment and mountainous piles of dirt. This anticipated activity greatly reduced the market value of the remaining property as of the date of taking.

The project's main lanes are elevated 37 feet above and nearly adjacent to the remaining property. The retail building on the remainder will be so close to the elevated structure that it will appear as if "inside a cavern." The elevation and proximity combine to leave main lane travelers unable to see anything but the back portion of the building's roof. Prior to the taking, the property was visible by prospective customers at the time they would see and thus decide to turn into a business on that property. These customers after the taking, who did not know to exit the main lanes well before the property was visible, would not see the property and could not reasonably access it. Visibility and accessibility are two of the primary criteria which attract high quality tenants and determine the property's market value.

Undisputed at trial, the condemnation project could not be built in the pre-existing right-of-way without the subject taking of the additional land sought from the Petitioners.

The only issue tried was the compensation due the Petitioners for the taking of their property. The jury found the value of the part taken was $7,559 and the diminution in market value of the remaining property was $74,880. The trial court entered judgment accordingly. The State appealed only the recovery of remainder damages. The State did not challenge the decrease in the remaining property's market value, but rather argued this injury, admittedly following from the taking and associated project, was noncompensable as a matter of law.

The Third District Court of Appeals at Austin, Powers, J., presiding, upheld the trial court judgment holding the measure of remainder damage was the decrease in market value of the remaining property and that all affects of the taking, and the associated uses, which would be considered in the marketplace as affecting value were properly considered in assessing just compensation. The State appealed reurging their argument.

The Texas Supreme Court, Hecht, J., presiding, reversed and rendered, holding (on October 27, 1993) the diminution in the remainder's market value was not the measure of compensation due, and the State could avoid paying for that diminution if caused by affects which arose from the project off the part taken and if the damage suffered was common to the surrounding community. The Texas Supreme Court affirmed only the compensation for the value of the strip of land taken.

On February 2, 1994, the Texas Supreme Court rejected Schmidt's Motion for Rehearing which asserted claims under the Fifth and Fourteenth Amendments to the Constitution.

REASONS FOR GRANTING THE WRIT

I. THE TEXAS SUPREME COURT FAILED TO USE THE PROPER MEASURE OF DAMAGES IN EVALUATING JUST COMPENSATION IN A PARTIAL TAKING CASE WHEN IT DISCARDED THE MARKET VALUE TEST.

While this Court has recently written on the liability question of when a taking occurs,[1] it has been almost 70 years since it has addressed the measure of damages to be used in determining just compensation in a partial taking case as presented here.[2] This Petition invites the Court to insure a proper remedy when the wrong, injury, and entitlement to compensation are undisputed. The Texas Supreme Court has rendered almost meaningless the protection provided by the Fifth Amendment to the Constitution by interposing a measure of damages which fails to afford just compensation.

This Petition does not concern the issue of determining when a taking occurs because the subject taking is admitted and serves as the basis on which the State originally sued Schmidt. Nor does this Petition ask this Court to determine whether or not damage to property value was sustained by virtue of the taking as such is not challenged by the State. Rather, this Petition seeks to have this Court reaffirm its earlier opinions and guarantee a

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[1] Most recently, *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 112 S.Ct. 2886 (1992).

[2] *Campbell v. United States*, 266 U.S. 368 (1924), discussed *infra*, at pp. 8-11.

condemnee full marketplace indemnification as the measure of just compensation in a partial taking case.

Just compensation must make a condemnee whole. Our Constitution demands "the full and perfect equivalent in money of the property taken. The owner is to be put in as good a position pecuniarily as he would have occupied if his property had not been taken." *United States v. Miller*, 317 U.S. 369, 373 (1942).

To insure full indemnification, American courts have adopted the *market value* measure of damages. *Miller, supra*, 317 U.S. at 374. If an entire property is taken, its owner must be paid enough money to acquire a new one of equal value and utility. If only a part of his land is acquired, the owner must be able to sell his remainder in the free market, take the compensation paid him by the government, and with the sum purchase a new whole property of value equal to his original holding. Thus the owner receives "the full and exact equivalent" for the property taken and the constitutional mandate is satisfied. *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 326 (1892).

Marketplace indemnification requires compensation not only for the part taken but also for damage to the remainder.

> While the part not taken is left in such shape or condition as to be in itself of less value than before, the owner is entitled to additional damages on that account.

Baumer v. Ross, 167 U.S. 548, 574 (1897).

The material facts in the subject case are not in dispute. "The State does not deny that the market value of the Schmidt and Austex tracts has diminished, nor does it challenge the amount of that diminution as found by the jury in each case." *Schmidt, supra,* 867 S.W.2d at 773. The court also agreed that in a transaction between private owners, the price for the land would "cover the value of the parcel sold as well as the loss in the value of the remainder occasioned by the buyer's use of his own property." *Schmidt, supra,* 867 S.W.2d at 776. The court simply decided the basic axiom of marketplace indemnification would not apply "when the buyer is the State." *Id.* By fiat, the State is granted a privileged status as purchaser of land. It may now plan public improvements and seize its citizens' property without fully accounting for the real costs of its taking of private lands or the sharing of those costs by the community. This is the very result the Takings Clause was designed to prohibit.

The only precedent from the Court cited for this ruling is *Campbell v. United States*, 266 U.S. 368 (1924). The Court should take this opportunity more fully to explain and develop *Campbell* because it has been misunderstood by courts, including now the Texas Supreme Court, which have applied it.

The holding in *Campbell*, which was driven by its unique facts, clearly was intended to apply the market value measure of remainder property damage rather than to provide an exception to that measure. The War Department abandoned its plans to construct a huge munitions factory and sold most of the land it had appropriated to industrial users who could benefit from the infrastructure which had been built. Campbell complained because increased industrialization of the area made his property

less desirable as a farm. The Court affirmed an award of the value of the land taken *and for the damages to the remainder because of the taking.* The Court refused to allow additional damages which followed from industrial uses made of properties which the Army had previously taken from others and then sold to private entities. *Campbell* at 369. In denying these additional damages, this Court observed that they did not result from the taking of that landowner's property. That neighboring properties could be put to industrial uses was a factor always inherent in the property and thus diminution in value from proximity to such uses did not arise from the taking. *Campbell* at 371.

The linchpin of the *Campbell* Court's analysis is its finding that the land taken from Campbell was not "*indispensable* to the construction of the nitrate plant or to the proposed use of the other lands acquired by the United States." *Campbell* at 371. Because Campbell's land was not "indispensable" to the proposed uses on neighboring lands, he could not recover damages to his remaining land caused by these uses.

In tying Campbell's recovery of remainder damages to only those which arose from uses on other lands for which uses the taking of Campbell's land was necessary or indispensable, the Court sought to approximate open market transactions. A seller in Campbell's position could not have obtained in the open market consideration for the industrialization of the area from a prospective industrial user who sought to purchase a portion of his property because, faced with such a demand in the marketplace, the purchaser would instead buy a neighboring tract. Recognizing his property would be damaged in the marketplace whether he sold a portion of it or not, a rational Campbell would

sell his property without expecting or receiving the additional consideration. The Court in *Campbell* merely applied the market test to the damages sought. *Campbell* at 371-372.

The Fifth Amendment does not always allow compensation for remainder property damages following from a public project where no property is taken (inverse condemnation) or where the damages would or could have occurred even in the absence of a taking (*Campbell*). However, it mandates such recovery when the public project requires a partial taking of property which is indispensable to that project, as in the subject case. Open market transactions operate the same way. For example, a property owner has no cause of action for recovery of damage if an adjoining neighbor utilizes its own property and pre-existing rights, or other available property, for the erection of a large, intrusive sign which blocks the view or otherwise damages the value of that property owner's land. However, if that adjoining neighbor requires some of the property owner's land for the erection of that sign, the property owner can refuse to sell it. If the property owner sells part of his property so as to allow the sign to be built, he would expect and insist to be paid not only for the property needed for the erection of the sign, but also for the diminution in value of his remaining property.

Assume, further, the adjoining neighbor could tie his billboard guy wire down to portions of any one of several neighboring tracts, *only* causing damage to the remainder of the tract involved. Each rational neighbor from whom the buyer could acquire a piece of land on which to tie his guy wire will ask the same measure of compensation: value of the land taken and

damage to the remainder.[3] Absent receiving consideration for both, each seller would refuse the sale and avoid the damages to his property. Schmidt cannot avoid this subject forced sale and therefore should receive no more or less than his actual damages.

The market value measure reflects the assumption that in the marketplace rationally motivated sellers and buyers, not under duress, will meet at a price for the property which reflects the property's value and the impact of the intended use on the remainder value. Sellers will not receive more because buyers would find different sellers. And buyers will pay this full measure because sellers have no rational reason to take less.

The Texas Supreme Court mistakenly reads *Campbell* to be an exception rather than the application of the market value measure of just compensation due for remainder property damage because the court does not have faith the marketplace will fairly reconcile the competing interests of a seller and buyer where the buyer is the government. That the marketplace provides the best measure of damages, however, is demonstrated by the two Ninth Circuit cases, cited by the Texas Supreme Court in *Schmidt*, which themselves may similarly misread *Campbell* but in which both still reach a result which is consistent with a pure application of the market value measure.

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[3] No neighbor would receive an additional extortive premium borne of the buyer's need because competing sellers would bargain down to the actual damage to be sustained. In the marketplace situation where there is only one seller, the extortive premium might be paid in addition to the seller's damages, but such additional recovery is disallowed in condemnation cases and is not being sought here. *Miller, supra*, 317 U.S. at 375.

In *United States v. 15.65 Acres of Land*, 689 F.2d 1329 (9th Cir. 1982), cert denied, 460 U.S. 1041 (1983), the court denied recovery for remainder property damage claimed for the loss of access over a neighbor's land which was also taken by the government. Recovery of such damages was properly denied because the landowner never had a right of access over his neighbor's land in any event as the neighbor could have refused to provide such access at any time. If he allowed the access, the neighbor could have granted it at a cost which would have rendered the landowner's remainder no more valuable than it was as the result of the taking. In this respect, *15.65 Acres* is similar to *Campbell* in that certain compensation sought was denied because the taking and the associated project were not the producing cause of the diminution in value.

In *United States v. Pope & Talbott, Inc.*, 293 F.2d 822 (9th Cir. 1961), the court upheld compensation for remainder property damages arising from the project's impact on accessibility. *Pope & Talbott, Inc.* at 825. Such is consistent with the marketplace realities. But also consistent with the marketplace is the court's denial of damages resulting from an increased fire hazard which hazard would potentially affect the property even in the absence of the taking. *Pope & Talbott, Inc.* is consistent with *15.65 Acres* and *Campbell*, and all three are consistent with and apply pure marketplace pressures and influences.

In the subject case, Schmidt's remaining property was devalued because of a project which could not have occurred absent the taking of a portion of his property. In the marketplace, Schmidt would receive an amount equal to the full jury award for the sale of that portion of his property for the

intended use. A true reading of the precedent employed by the Texas Supreme Court supports rather than defeats the award. The Court should not allow the Fifth Amendment to be gutted by the proliferation of exceptions to the pure application of the market value measure of just compensation.

Additionally, and unlike the landowner in *Campbell*, the Petitioners in this case have never sought to recover for community-wide changes in land use. They are attempting to recover for diminution in the value of their property directly occasioned by the construction and operation of an adjacent public improvement. These traditional remainder damages were specifically allowed in *Campbell*. Even if "community" in nature, however, the Fifth Amendment contains no exception for recovery of compensation for that type of injury. In any event, the Texas Supreme Court's determination that the remainder damages sought by Schmidt were community in nature defies reality and allowed for the arbitrary denial of marketplace measured just compensation.

Because its unique fact situation has not been repeated, *Campbell* has never been cited by the Court as a dispositive precedent. Nevertheless, some local and state governments, including now Austin and Texas, have seized on the holding in routine cases to justify the payment of less than full and just compensation. In many states the conflict between demand for public improvements and unwillingness to pay higher taxes has become critical. On several occasions the Court has found local governments liable to meet their obligation to pay for a "taking." Frustrated, Texas now seeks to escape the remedy by redefining "just compensation" to suit its fiscal ends.

The issue is not whether a loss occurred, but who will be required to bear it. The Texas Supreme Court has held that it should be cast upon the landowner unfortunate enough to abut the new roadway rather than being allocated among the millions of citizens who will use and enjoy it. This conclusion is manifestly offensive to the essence of the Fifth Amendment which is "designed to bar government from forcing some people alone to bear public burdens, which in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The Court should clarify its decision in *Campbell* and reinstate full application of the market value test to determine just compensation.

II. THE TEXAS CONDEMNATION STATUTE, AS APPLIED TO THE PETITIONERS, DENIES EQUAL PROTECTION OF THE LAW.

Where an express constitutional right is implicated, unequal treatment within a protected class will only be tolerated after strict judicial scrutiny and upon a showing of compelling state interest. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440 (1985). The Texas condemnation statute, as interpreted by the Texas Supreme Court and applied to the Petitioners, denies equal protection under the law because it employs an irrational classification scheme to determine whether a landowner, part of whose land is taken, is entitled to full marketplace indemnification. Rather than employing the market-derived "indispensability" test utilized by the Court in *Campbell, supra*, 266 U.S. 368 (1924), the Texas Supreme Court adopts a "substantiality" test never employed by the Court and in conflict with the Court's directive in *Campbell* that the landowner be

restored to the position he would have occupied in the marketplace absent the taking.[4] Further, the Texas condemnation statute's disallowance of recovery for "community" damages abrogates the guaranteed recovery of just compensation and interjects an unconstitutionally vague test which can be and here was applied to deny equal protection.

The Texas Supreme Court was apparently influenced in adopting its classification scheme by a superficial anomaly. *Schmidt, supra*, 867 S.W.2d at 775. Under Texas law, a property owner whose land is totally acquired for a project will recover its full market value. *City of Fort Worth v. Corbin,* 504 S.W.2d 828, 831 (Tex. 1974), TEX. PROP. CODE ANN. § 21.042(b). (App. at A-2.) He may recover the market value of his property determined with reference to any factor which buyers and sellers in the marketplace would consider, including visibility and accessibility. *Corbin, supra*, 504 S.W.2d at 831. In contrast, the landowner who owns property adjacent to a public project, but from whom the government takes no property for the project, is generally not entitled to compensation.[5] See, e.g., *City of Austin v. Avenue Corp.*, 704 S.W.2d 11 (Tex. 1986); and, *City of Houston v. Fox*, 444 S.W.2d 591 (Tex. 1969). This landowner suffers a similar financial injury due to the visibility and accessibility his property loses, but is not entitled to indemnification. These rules create superficially anomalous results under Texas law.

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[4] See, *Campbell, supra*, 266 U.S. at 371.

[5] The government would be liable in this situation, however, if its project constituted a legal nuisance. *City of Abilene v. Downs*, 367 S.W.2d 153, 159 (Tex. 1963).

There is a defining point in between these two extremes which determines when a landowner becomes entitled to full marketplace indemnification. The Court has recognized this trigger event is the physical taking of land. See, *Kirby Forest Ind., Inc. v. United States*, 467 U.S. 1 (1984) (where there is no taking, no compensation is required even though the property's value may be substantially reduced), and *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (physical taking of land triggers requirement to pay just compensation). Uncompensated losses which occur absent a taking are simply a result of a takings jurisprudence which "is full of these 'all or nothing' situations." *Lucas v. So. Carolina Coastal Council*, __U.S.__, 112 S.Ct. 2886, 2895 (1992), footnote 8.

The mistake made by the Texas Supreme Court is that it reads *Campbell* to create a different trigger event for full indemnification which depends on the amount of land taken from the landowner. *Schmidt*, 867 S.W.2d at 778. Because it failed to understand that *Campbell* did not limit, but rather furthered, marketplace indemnification, the Texas Supreme Court mistakenly concluded the Court had endorsed less than the full indemnification in certain partial takings cases.

The Texas Supreme Court's misreading of *Campbell* to endorse limits on marketplace indemnification (rather than furthering it) would have been harmless had it simply adopted the criteria adopted by the Court in *Campbell*: a landowner is entitled to recover damages to his land caused by activities on other land if the land taken from him is indispensable to such

activities.[6] However, as is often the case where the underlying reasons for rules and distinctions are misunderstood, the Texas Supreme Court seized upon a rule for determining when to disregard damages accruing to property due to activities on other lands and misapplied it so as to create a result which bears no relation to open market transactions.

The Texas Supreme Court adopts a rule that compensation for damaging activities on other lands can be obtained when the taking is "substantial," but not when the taking is "insubstantial." *Schmidt, supra*, 867 S.W.2d at 778. In other words, "big" partial takings entitle the landowner to full market indemnification, but "small" partial takings do not. Were the implications of such a rule not so devastating to Texas landowners, it would be comical it is so preposterous.

The Texas Supreme Court took the "substantiality" test from a Ninth Circuit opinion, *United States v. 15.65 Acres of Land*, 689 F.2d 1329 (9th Cir. 1982), cert. denied, 460 U.S. 1041 (1983). The *15.65 Acres* court grafts this test onto the "indispensability" test stated by the Court in *Campbell*,[7] though the Court did not allude to such a condition to full marketplace indemnification. As noted, *supra*, at pp. 10-11, conditioning recovery of damages due to activities on other lands based on the indispensability of the

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[6] In the subject case, the land taken from the Petitioners was indispensable to the highway conversion. *Schmidt, supra*, 867 S.W.2d at 779.

[7] *15.65 Acres* also imposes a "separability" condition. However, since takings for highway conversions are integrated in the project as a whole, this is not a significant additional condition in this context.

property acquired for those activities tracks open market treatment of similar transactions. However, whether the property at issue is "big" or "small" or "substantial" has nothing to do with a landowner's ability in the marketplace to obtain full indemnification for his injuries. A small sliver of property can be crucial to activities occurring on other lands and therefore command full market indemnification,[8] while a property many times its size could not command such indemnification if not indispensable to the activities on the other lands. The Texas Supreme Court's interpretation of the Texas Property Code must be rejected as irrationally denying constitutionally guaranteed full marketplace indemnification to the class of landowners from whom indispensable but "small" pieces of land are taken, but awarding compensation to similarly situated landowners from whom indispensable but "large" pieces of land are taken.

A second denial of equal protection occurs when the Texas Supreme Court holds that the Petitioners' damages were "community" in nature and unrecoverable under TEX. PROP. CODE ANN. § 21.042(d). (App. at A-3). The Schmidt Court held that recovery is only allowed where the damages differ in kind and not just in degree from those imposed on other property owners along the roadway. *Schmidt, supra*, 867 S.W.2d at 781. Under this rule, the State's duty to compensate under the Fifth Amendment is reduced so long as several other properties are simultaneously taken in similar fashion.

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[8] See, pp., 10-11, supra, showing how a small piece of land to be used for a billboard guy wire could command full market indemnification.

This holding is unsound on several grounds. First, the statute on which the Texas Supreme Court based its decision is unconstitutional because there is no basis under the Fifth Amendment to limit damages on the grounds the "community" suffers them. Under this reasoning Mr. Lucas could have never recovered his damages for the zoning of his beach front property to a fallow tract because the regulation operated equally on all properties in the area. See, *Lucas, supra*, ___ U.S. ___, 112 S.Ct. 2886 (1992). It is simply is not (and cannot be) the law that the government can avoid liability for damages which would be otherwise recoverable because the damages are common to several property owners.

Second, such an interpretation of the Texas condemnation statute creates irrational distinctions between landowners whose property is injured by public improvements and those whose land is enhanced by similar public improvements. Some public projects benefit surrounding properties. The government can impose assessments on such properties if it can show the benefits to these properties were "special" to them, as opposed to being enjoyed community-wide. TEX. REV. CIV. STAT. ANN. art. 1105b (Vernon Supp. 1992) (authority to assess for construction and improvements made to highways, public streets, etc.); TEX. REV. CIV. STAT. ANN. art. 1175 (Vernon Supp. 1992) (same). The government's entitlement to impose assessments for special benefits of public improvements is the mirror image of the landowner's entitlement to recover damages for the loss of these benefits arising from the construction or alteration of such improvements.

However and under Texas law as applied in *Schmidt*, the extent of the government's right to recover for special benefits it confers is not the mirror image of the landowner's right to recover damages when these same benefits are lost. Texas governmental bodies are entitled to show how a new road improves visibility and accessibility and thus enhances the value of abutting properties and then recover for that enhancement from the abutting landowners. The addition of such benefits are deemed to be special, not community. *Cook v. City of Addison*, 656 S.W.2d 650, 658 (Tex. App.-Dallas 1983, writ ref'd n.r.e.). The identical factors are deemed to be community, not special, when they are taken instead of added. *Schmidt, supra*, 867 S.W.2d at 781. It is hard to imagine a more clear example of an arbitrary and irrational distinction: classification of identical benefits of roadway project depends on whether they are being added or taken away.

Finally, categorization of the Petitioners' damages as "community" is irrational from a purely factual standpoint which is so clear as to be established as a matter of law. The Petitioners' losses are not in any sense borne by the general population; they are peculiar to the Petitioners' ownership of their land, which land is uniquely situated in the general community because it is an abutting tract. On every day since their property was severed, the Petitioners have owned a less useful and less profitable asset. These losses lead to interim losses of rental income and will finally be realized by the Petitioners alone when their property is sold for a fraction of its original market value. Neither the State nor the Supreme Court of Texas has suggested any mechanism by which any part of these losses will be shared

by any other member of the community or that similar losses are generally shared.

The Texas Supreme Court's interpretation of the compensation due a landowner for the partial taking of his property fails Equal Protection standards. The Fifth Amendment makes no distinction between partial and total takings. It commands just compensation for any taking measured by market value. The rule announced by *Campbell*, requiring that compensation for damages due to activities on other lands depends on whether the land taken was "indispensable" to such activities, is not an exception to, but the application of this measure. The Texas Supreme Court's additional classification of partial takings into "big" takings or "small" takings does not even purport to emulate open market transactions. A classification more arbitrary, more irrational and more contradictory to the United States Constitution's guarantee of equal protection under the laws could hardly be imagined. In denying Schmidt marketplace indemnification based on a "community" damage exception, an exception nowhere found in the Fifth Amendment, the Texas Supreme Court applies an unconstitutionally vague term in an arbitrary manner. While this furthers the State's financial interest, it does so at the expense of Schmidt's equal protection under the law.

CONCLUSION

Over the past decade the Court has taken pains to clarify citizens' rights under the Fifth Amendment to Just Compensation in the face of increasing governmental regulation of private property. This case, like *Lucas* and its predecessors, presents a classic case of governmental overreaching. In *Lucas*, the Court found the Fifth Amendment simply cannot tolerate a governmental windfall from the failure to compensate for the regulation of property which destroys value. Here, the government again seeks a windfall, fashioning a rule to compensate physical takings of land which allow it consistently to pay a fraction (here, roughly a tenth) of the actual market value loss suffered by the landowner. If there were ever a case of an exception (*Campbell*) swallowing the rule (marketplace indemnification), this is it.

This case presents this Court with an opportunity to clarify the other half of the just compensation equation and reaffirm the fundamental *Campbell* rule that a landowner's compensation is just only when it reflects the actual market loss he suffers. It was very important for the Court to find governments liable for compensation for landowners in the face of certain extremes of government regulation. It is equally important the Court insure the constitutionally guaranteed remedy of just compensation where liability exists. Without meaningful substance to the Takings Clause, the right to just compensation means little.

The Court should grant this Petition and allow the landowners to more fully develop and brief their position so that the Court might clarify the substantive guarantee of Just Compensation.

Respectfully submitted,

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TEXAS PROPERTY CODE

§ **21.041 Evidence**

As the basis for assessing actual damages to a property owner from a condemnation, the special commissioners shall admit evidence on:

(1) the value of the property being condemned;

(2) the injury to the property owner;

(3) the benefit to the property owner's remaining property; and

(4) the use of the property for the purpose of the condemnation.

§ **21.042 Assessment of Damages**

(a) The special commissioners shall assess damages in a condemnation proceeding according to the evidence presented at the hearing.

(b) If an entire tract or parcel of real property is condemned, the damage to the property owner is the local market value of the property at the time of the special commissioners' hearing.

(c) If a portion of a tract or parcel of real property is condemned, the special commissioners shall determine the damage to the property owner after

estimating the extent of the injury and benefit to the property owner, including the effect of the condemnation on the value of the property owner's remaining property.

(d) In estimating injury or benefit under Subsection (c), the special commissioners shall consider an injury or benefit that is peculiar to the property owner and that relates to the property owner's ownership, use, or enjoyment of the particular parcel of real property, but they may not consider an injury or benefit that the property owner experiences in common with the general community.

(e) [This section was declared unconstitutional and is not reproduced.]

OPINION OF THE TEXAS SUPREME COURT

867 S.W.2d 769 (Tex. 1993)

STATE of Texas and City

of Austin, Petitioners,

v.

Robert M. SCHMIDT and Richard A.

Massman, Co-Trustees of the Leon A.

Schmidt Children's Trust No. 1 et al.,

Respondents.

STATE of Texas and City

of Austin, Petitioners,

v.

AUSTEX, LTD. et al.,

Respondents.

Nos. D-1006, D-1509

Supreme Court of Texas.

Oct. 27, 1993.

Rehearing Overruled Feb. 2, 1994

OPINION

The principal issue in these two consolidated cases is whether a landowner, part of whose property is taken by power of eminent domain to convert a roadway into a controlled access highway, is entitled to compensation for a diminution in the value of the remainder due to a diversion of traffic, an increased circuity of travel to the property, a lessened visibility to passersby, and the inconvenience of construction activities. The lower courts allowed the compensation in both these cases. *State v. Schmidt*, 805 S.W.2d 25 (Tex. App.--Austin 1991); *State v. Austex, Ltd.*, 862 S.W.2d 1 (Tex. App.--Austin 1991). We disagree and accordingly reverse the judgments of the court of appeals and render judgment against the landowners.

I

These cases involve two adjoining tracts of land abutting U.S. Highway 183 in the City of Austin some seven miles north of downtown. One of the tracts is owned by the Leon A. Schmidt Children's Trust No. 1, and hence we refer to it as the Schmidt tract. The other is owned by Austex, Ltd., a Nevada corporation, and Cavendish Holdings, Ltd., a Maryland corporation, and we

refer to it as the Austex tract. The immediate area is depicted in this schematic:

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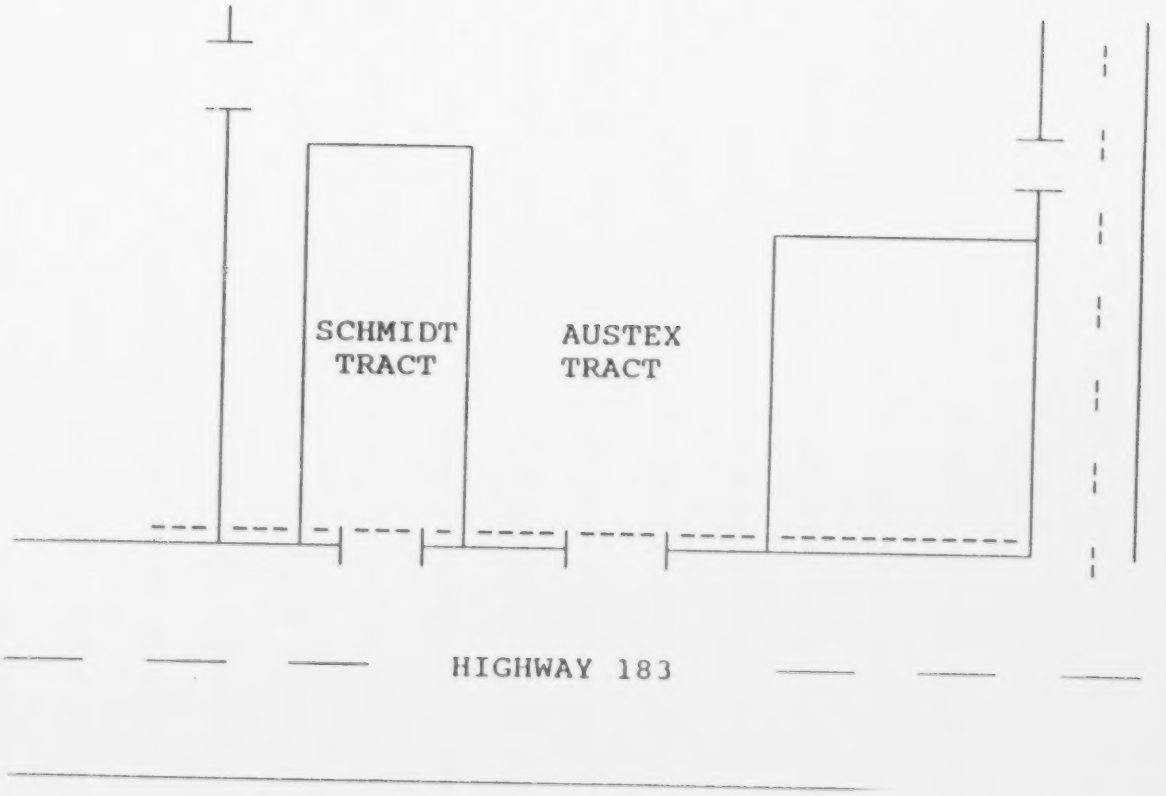
The rectangular Schmidt tract extends some 75 feet along the highway and 200 feet back. Toward the rear of the property is a building for two tenants-at the time of trial, a personal computer software outlet and a film processing business. The area between the building and the highway is used for parking.

The 3.76-acre Austex tract surrounds the Schmidt tract on three sides and thus fronts the highway on both sides of the Schmidt tract, approximately 40 feet on one side and 150 feet on the other. There are two buildings on the Austex tract, one to the rear of the property, and the other along one side across from the building on the Schmidt tract. These buildings, known as the Town North Shopping Center, were occupied at the time of trial by a post office substation, a night club, and several retail businesses, including a bookstore, restaurant, beauty salon, video store, and office supply store. The narrower strip on the one side of the Schmidt tract is vacant. On the other side, the area nearest the highway is used for parking.


SCHMIDT
TRACT
AUSTEX
TRACT
HIGHWAY 183

Highway 183 - or Research Boulevard as it is known at this location - is a major traffic artery, and much of the land along both sides of it, like the Schmidt and Austex tracts, is used for free standing retail outlets and other commercial developments. Beyond and sometimes among these developments are residential areas. In the vicinity of the Schmidt and Austex tracts, the highway has six lanes, three for traffic in each direction separated by a grassy median, all on the same grade as intersecting streets and the surrounding property. Buildings on adjacent property, including those on the Schmidt and Austex tracts, are clearly visible from the highway. The Schmidt and Austex tracts are connected to the highway by driveways allowing traffic in the lane nearest the tracts direct access. Traffic in the opposite direction must cross the highway at an intersection and gain access by the side street, Fairfield Drive, or by returning back the opposite direction and using a driveway.

The State of Texas and the City of Austin (both of which we refer too as the State) have decided to convert Highway 183 into a controlled access highway. This change entails eliminating grade crossings, which will be accomplished in the area of the

Schmidt and Austex tracts by elevating the main traffic lanes some 37 feet. As a result, the buildings below will be less visible to motorists on the elevated highway. All six lanes at grade will remain in service, and access to the tracts from those lanes will remain unchanged. Most of the traffic, however, will be diverted to the elevated main highway,

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from which motorists must exit by a ramp to the lower roadway to gain access to the tracts. This route of access will be somewhat more circuitous and less convenient than at present. Construction is to be done in phases extending over a total of five years.

The alterations to Highway 183 require expansion of the existing right-of-way a little less than seven feet into the Schmidt and Austex tracts (shown by the dotted line in the schematic above) to meet minimum right-of-way requirements for federal funding of the highway construction. Accordingly, the State instituted these condemnation proceedings to take a small strip of land - about 503 square feet from the Schmidt property and about 1,275 square feet from the Austex property - along the highway frontage. The special commissioners awarded the owners of the

two tracts $7,559 and $105,000, respectively, and the owners appealed.

In the case of the Schmidt tract, the owner stipulated that the value of the strip taken was $7,559, but claimed additional compensation for the decreased market value of the remainder of the tract due to two factors: the impairment of its visibility from the main highway, and the inconvenience and disruption caused by construction activities extending over a period of several years. The owners of the Austex tract also claimed compensation for a reduction in the market value of the remainder of their property due the same two factors plus two others: the diversion of traffic from the highway at grade level, and the resulting circuitry of travel required to gain access to the tract. Each case was tried to a jury, who found severance damages - the diminution in the market value of the remainder after the condemnation - of $74,880 for the Schmidt tract and $200,000 for the Austex tract. The jury in the Austex case also found the value of the strip taken to be $18,932. Each trial court rendered judgment on the verdict. The State appealed only the award of severance damages, and not

the awards for the land actually taken. The court of appeals affirmed both judgments.

II

Article I, section 17 of the Texas Constitution provides in pertinent part: "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made. . . ." Very early in the State's history, we held that when part of a person's property is taken, this provision requires adequate compensation both for the part taken and any severance damages to the remainder. *Buffalo B., B. & Colo. R.R. v. Ferris*, 26 Tex. 588, 603 (1863) (applying identical language from Tex. Const. of 1861, art. I, § 14). Consistently, section 21.042(c) of the Texas Property Code now provides:

If a portion of a tract or parcel of real property is condemned, the special commissioners shall determine the damage to the property owner after estimating the extent of the injury and benefit to the property owner, including the effect of the condemnation on the value of the property owner's remaining property.

The measure for determining severance damages was established in *State v. Carpenter*, 89 S.W.2d 194, 197-198, 200 (Tex. 1936):

> We are of the opinion that the proper rule for ascertaining the measure of damage to the remainder of a tract of land where a part only has been taken for public use is directly analogous to the rule which is applicable when there has been a permanent injury to land by reason of the construction of an improvement, or the construction of an improvement by a private agency exercising the right of eminent domain. By this rule the damages are to be determined by ascertaining the difference between the market value of the remainder of the tract immediately before the taking and the market value of theelainder nf the tract immediately after the appropriation, taking into consideration the nature of the improvement, and the use to which the land taken is to be put. Of course, this rule relates to the ascertainment of the damages to the property itself. There may possibly be items of special damages which may not be accurately reflected in the difference between the market value before and the market value after, but everything which affects
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> the market value of the land itself, having due regard for past and probable future injuries, may be accurately reflected by ascertaining the difference in value, when all the legitimate testimony is properly submitted to the jury for consideration.
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> * * *
>
> Generally, it may be said that it is proper as touching the matter of the value and depreciation in value to admit evidence upon all such matters as suitability and adaptability, surroundings, conditions before and after,

> and all circumstances which tend to increase or diminish the present market value. Evidence should be excluded relating to remote, speculative, and a conjectural uses, as well as injuries, which are not reflected in the present market value of the property.

The rule in the *Carpenter* case, which is as settled as any in our jurisprudence can be, is the basis for the position taken by Schmidt and Austex.

Their argument runs as follows. *Carpenter* requires that all factors affecting the fair market value of the remainder be considered in determining severance damages. It cannot be denied that traffic patterns, convenience of access, visibility, and the disruption of construction activities over an extended period of time can affect the market value of property. Therefore, these factors must be taken into consideration in ascertaining severance damages. When this is done in the present cases, the State does not deny that the market value of the Schmidt and Austex tracts has diminished, nor does it challenge the amount of that diminution as found by the jury in each case. Thus, the award of severance damages was proper.

The State has three responses, and we examine each in turn.

III

The State argues that the four elements of injury claimed by Schmidt and Austex should not be considered in assessing severance damages because they are not the kind of injuries for which compensation is due under the Constitution and the statutory provision. As authority for this assertion, the State cites several inverse condemnation cases - actions brought by landowners complaining that their property has been damaged or taken for public use without payment of adequate compensation.

The first such case is *State Highway Comm'n v. Humphreys*, 58 S.W.2d 144 (Tex. Civ. App.--San Antonio 1933, writ ref'd), which arose from the State's proposal to re-route a highway around the town of Comstock to allow motorists to avoid the downtown area, leaving the old road through town without change. Business owners along the road in town obtained an injunction against relocating the main highway, contending that the diversion of traffic caused by rerouting the main highway amounted to a taking or injuring of their property without due process. In an opinion approved by this Court, the appellate court reversed, explaining:

> "The benefits which come and go from the changing currents of travel are not matters in respect to which any individual has any vested right against the judgment of the public authorities." [Citing *Heller v. Atchison, T. & S. F. Ry.*, 28 Kan. 625 (1882).] If the public authorities could never change a street or highway without paying all persons along such thoroughfares for their loss of business, the cost would be prohibitive. The highways primarily are for the benefit of the traveling public, and are only incidentally for the benefit of those who are engaged in business along its way. They build up their business knowing that new roads may be built that will largely take away the traveling public. This is a risk they must necessarily assume.

Id. at 145.

In *DuPuy v. City of Waco*, 396 S.W.2d 103 (Tex. 1965), the trial court awarded a landowner damages for a diminution in the value of his property resulting from the construction of a viaduct and changes in the street in front of his property. We agreed that the landowner was due compensation, but only because he had been deprived of reasonable access to his property. We explained that allowance of damages for a deprivation of reasonable access did not conflict with *Humphreys*, which stands

> principally for the propositions that an abutting property owner does not have a vested interest in the traffic that passes in front of his property; that he cannot recover for loss of trade resulting from a highway relocation; and that he is not entitled to damages because of the construction

> of controlled access highways in such manner as to deny direct access to the new major highway.

Id. at 109. In a companion case to *DuPuy*, brought by a neighboring landowner, we held that the landowner had not been deprived of reasonable access and therefore was not entitled to any compensation at all. *Archenhold Auto. Supply Co. v. City of Waco*, 396 S.W.2d 111 (Tex. 1965). In *City of Houston v. Fox*, 412 S.W.2d 745 (Tex. Civ. App.--Houston [1st Dist.] 1967), the court of civil appeals held that the degree of impairment of access to property must be considered in light of its highest and best use. So, the court reasoned, a diversion of traffic which resulted in substantially less convenient access to a retail business can be a compensable injury, even if it would not be were the property used for some other purpose. Based on this analysis, the court affirmed an award of damages to the landowner. We rejected this reasoning on the grounds that it conflicted with *Archenhold* and *DuPuy*. 419 S.W.2d 819 (Tex. 1967) (per curiam). On remand, the appeals court again affirmed an award of damages to the landowner. We again reversed the appeals court and rendered judgment that the landowner recover nothing. *City of Houston v. Fox*, 444 S.W.2d 591 (Tex. 1969). The same day we issued our

second opinion in *Fox*, we held in *City of Waco v. Texland Corp.*, 446 S.W.2d 1, 2 (Tex. 1969), "that property has been damaged for a public use within the meaning of the Constitution when access is materially and substantially impaired even though there has not been a deprivation of all reasonable access. . . ." Applying this new test in *Fox*, we held that access to his property had not been materially and substantially impaired. We explained: "Cities may make streets narrower without violating the rights of the abutting landowner. . .unless the street is so narrowed or altered as to materially and substantially impair the landowner's access." 444 S.W.2d at 592-593 (citation omitted). And we added: "[A]ny injury due to diversion of traffic or circuity of travel with reference to the [landowner's] property brought about by the changes in [the abutting] streets is noncompensable." *Id.* at 593.

In *City of Beaumont v. Marks*, 443 S.W.2d 253 (Tex. 1969), we again allowed damages for a material and substantial impairment of access to a landowner's property due to a change in grade of nearby railroad tracks. We also held, however, that it was reversible error to admit evidence of a diminution in the

value of the property due to a diversion of traffic. Citing *Humphreys*, we reaffirmed: "Diversion of traffic resulting in the necessity of using circuitous routes is not compensable." *Id.* at 257. We repeated this statement in *City of San Antonio v. Olivares*, 505 S.W.2d 526 (Tex. 1974), where we held that hotel owners were not entitled to damages for the partial closure of a dedicated alley behind their property.

Thus, we have often disallowed, and never allowed, recovery in an inverse condemnation case for damages resulting from a diversion of traffic or a circuity of travel. While we have never addressed the issue of whether a landowner has a right to recover for an impairment in the visibility of his premises to passing traffic, there is no reason why recovery for this type of injury should be more available than for a diversion of traffic or circuity of travel. Just as a landowner has no vested interest in the volume or route of passersby, he has no right to insist that his premises be visible to them. *See* JULIUS L. SACKMAN & PATRICK J. ROHAN, NICHOLS, THE LAW OF EMINENT DOMAIN (3d ed. rev. 1992) § 14.13[2], at 14-310 ("It has been held that an impairment

of this right [to be seen] is not a legally cognizable element of damage.").

In the one case in which we have considered a claim for damages for the inconvenience of highway construction, we have recognized that recovery may be allowed in some limited situations. In *City of Austin v. Avenue Corp.*, 704 S.W.2d 11 (Tex. 1986), a restaurant owner sued for lost profits caused by reconstruction of the street and sidewalk

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in front of his premises over a period of nine months. Although the trial court found that there had been a material and substantial interference with access to the premises, we held that damages could not be recovered unless there was either a total temporary or partial permanent restriction of access, or a partial temporary restriction of access due to illegal or negligent activity. *Id.* at 13. Schmidt and Austex do not claim that their injuries fall within any of these three categories. Rather, they contend that construction activities in front of their property, while not precluding access, will make it so inconvenient that businesses on

the property will be damaged. We spoke to this contention in *Avenue Corp.*:

> The inconvenience and damage which a property owner suffers from these temporary obstructions are incident to city life and must be endured. The law gives him no right to relief, recognizing that he recoups his damage in the benefit which he shares with the general public in the ultimate improvement which is being made.

Id. at 12 (quoting *L.M.S., Inc. v. Blackwell,* 149 Tex. 348, 233 S.W.2d 286, 289 (Tex. 1950), quoting in turn *Farrell v. Rose,* 253 N.Y. 73, 170 N.E. 498 (1930)).

Under the general rules of the cases we have cited, none of the four elements of injury asserted by Schmidt and Austex amounts to a taking or damaging of property that is compensable in an inverse condemnation case. Schmidt and Austex acknowledge this and concede that they would not be entitled to recover in an inverse condemnation action for any of the injuries they have alleged. They argue, however, that the rule should be different when those injuries are accompanied by a physical taking of property, as in condemnation cases. In all such cases, they say, the threshold requirement for recovery, that a taking occur, is satisfied by the fact that the condemnor has filed suit, and the only remaining issues are the value of the property taken and the

injury, measured in loss of value, to the remainder. Under *Carpenter*, they insist, every factor contributing to the claimed loss must be considered, including the four asserted here.

Allowing recovery for an injury in condemnation cases when recovery is not allowed for the same injury in inverse condemnation cases creates an anomaly illustrated by the following hypothetical. Suppose in the present cases that the change in Highway 183 necessitated taking a small strip from the Austex tract only, without taking any part of the Schmidt tract. Schmidt would still contend that the value of his property had been injured to the same degree as the value of the remainder of Austex' property, since the taking of part of Austex' property did not itself contribute to any diminution in the remainder. Yet according to Schmidt and Austex' argument, only Austex could recover damages for his injury. If no part of Schmidt's property were taken, Schmidt's only recourse would be an action for inverse condemnation in which, as Schmidt and Austex concede, Schmidt could not prevail. In these circumstances, adjacent landowners would suffer identical injury, yet only one could recover, the one a part of whose property was physically taken.

Schmidt and Austex argue that this is not an anomaly but a reflection of the marketplace. They give the following illustration. A landowner may use his property in any legal way, even if it causes the value of his neighbor's property to be diminished, and the neighbor is without recourse. But if the landowner must acquire part of his neighbor's property before he can use his own in a particular way, he can expect his neighbor to charge a price for that part which will compensate him both for the part and for the diminution in the value of the remainder caused by his use of his property. This, Schmidt and Austex argue, is the situation in these cases. If the State did not need part of their property to complete the Highway 183 project, they would have no claim for damages. But the State did not need part of their property to complete the Highway 183 project, they would have no claim for damages. But the State does need part of their property, and because it does, it must pay both for that part and for the injury to the remainder caused by the use for which the part taken is essential.

The flaw in this argument is that it does not assume a willing buyer; rather, it assumes a buyer constrained to buy or abandon his plans for the use of his other property.

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This buyer must decide whether to pay his neighbor more than the value of the small piece of property actually acquired, or forego his plans. The seller in

this situation can certainly *try* to charge a price that will cover the value of the parcel sold as well as the loss in the value of the remainder occasioned by the buyer's use of his own property; indeed, the seller might try to charge even more, hoping that the buyer's interest in his plans will motivate him to pay a premium. The fact that a seller in the marketplace is free to take advantage of a buyer's circumstances if he can does not justify the same conduct when the buyer is the State.

The argument that a different rule applies in condemna tion cases and inverse condemnation cases does not find support in our decisions. To the contrary, our decisions in condemnation cases have uniformly refused to allow severance damages based upon diversion of traffic and circuity of travel. Thus, in

Pennysavers Oil Co. v. State, 334 S.W.2d 546 (Tex. Civ. App.--San Antonio 1960, writ ref'd), the State, as in the cases before us, condemned a small strip of property in order to convert an abutting two-lane road into a controlled access highway. The State and landowner agreed as to the value of the part taken, but disagreed as to whether there was any loss in the value of the remainder, just as the parties in the present cases have done. The trial court rendered judgment on a verdict that there was no loss to the remainder. This Court, in refusing writ, concluded that an owner of property abutting a highway has no right to unimpaired access to traffic, although he does have a right of some access. If access is completely denied, the court explained, damages must be paid, and the measure is the diminution in the value of the remainder. But if the right is only impaired, there is no entitlement to compensation. The opinion explained that

> no abutting property owner has a vested interest in the traffic that passes in front of his property, and if this traffic is diverted by the State building a road at another place, and the traveling public prefer to travel the new road and abandon the old road, the State cannot be held liable for any loss of trade suffered by an abutting landowner on the old abandoned road.

Id. at 549. As authority the opinion cited, among other cases, *Humphreys*, an inverse condemnation case.

In *State v. Baker Bros. Nursery*, 366 S.W.2d 212 (Tex. 1963), the State again sought condemnation of part of a parcel of property in order to convert a road into a controlled access highway. The trial court granted the State's pretrial motion in limine to suppress any evidence regarding changes in traffic flow on the value of the remainder. The landowner complained of this ruling on appeal. The court of civil appeals observed that the trial court's exclusion of evidence may have been error, but it was not prejudicial. 357 S.W.2d 163, 167 (Tex. Civ. App.--Fort Worth 1962). This Court disagreed:

> The Court of Civil Appeals further held that it was error for the trial court to sustain a motion made by the State in advance of trial, which not only sought to suppress and reference by counsel to, or any evidence of, the direction of the flow of travel upon the proposed limited access highway resulting from the condemnation, but further to likewise suppress reference or evidence of any circuity of travel occasioned by such highway. This was not a case where all access to the new highway was denied, but a case where each remaining tract had access to the highway through the frontage roads alongside and parallel to the highway. Under these circumstances, there was no error by the trial court in sustaining the State's motion to suppress.

366 S.W.2d at 214. In reaching this conclusion the Court relied upon *Pennysavers*.

Much more recently, in *State v. Wood Oil Distrib., Inc.*, 751 S.W.2d 863 (Tex. 1988), the trial court granted the State's motion in limine to exclude evidence that the remainder of property on which the landowner operated a truck stop had been damaged by increased circuity of travel due to construction of a highway. The court of appeals reversed. This Court affirmed the trial court. In a unanimous opinion, the Court stated:

> It is well settled that damages to a condemnee's business which result merely
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> from traffic being required to travel a more circuitous route to reach a condemnee's property are not compensable. [Citing *Olivares, Fox, Texland*, and *Marks*.] The question of whether there has been a material and substantial impairment of access or whether there exists merely the issue of circuity of travel is a question of law, not of fact. It is incumbent upon the trial court to make this determination prior to trial and to control the admission of evidence accordingly. Thus, the introduction of evidence on damages due to inconvenience suffered by a property owner as a result of circuity of travel is improper as a matter of law since it is a non-compensable matter. [Citing *Olivares, Texland, Marks*, and *DuPuy*.] Accordingly, the court of appeals erred in reversing the trial court on the basis of exclusion of evidence on this issue.

Id. at 865. All of the cases on which we relied in *Wood Oil* were inverse condemnation cases.

Thus, we have refused to allow recovery for loss of value due to diversion of traffic and circuity of travel in both condemnation cases and inverse condemnation cases. We have not considered whether severance damages should be allowed because of impaired visibility of property or disruption of use due to construction activities, but there is no reason why these two elements of injury should be treated differently than the others. The decisions of the courts of appeals involving these issues have not been entirely consistent. *Compare Olson v. Harris County*, 807 S.W.2d 594, 595 (Tex. App.--Houston [1st Dist.] 1990, writ denied) (circuity of travel not compensable); *Holbrook v. State*, 355 S.W.2d 235 (Tex. Civ. App.--Eastland 1962, writ ref'd n.r.e.) (severance damages denied for diversion of traffic, circuity of travel, and construction inconvenience); *with State v. Buck*, 489 S.W.2d 642 (Tex. Civ. App.--Corpus Christi 1972, writ ref'd n.r.e.) (severance damages allowed for diversion of traffic and circuity of travel); *Milam County v. Akers*, 181 S.W.2d 719 (Tex. Civ. App.--Austin 1944, writ ref'd w.o.m.) (severance damages allowed for

diversion of traffic). To the extent *Akers* and *Buck* conflict with the principles in *Pennysavers, Baker Bros.*, and *Wood Oil*, they are disapproved.

Schmidt and Austex' argument that different rules should apply in condemnation cases and inverse condemnation cases is not supported by the decisions of this Court. While were are not prepared to insist that the two types of cases always be governed by identical rules, with respect to the elements of injury Schmidt and Austex claim, the general rule inverse condemnation cases and condemnation cases has been the same.

Schmidt and Austex nevertheless contend that even if severance damages based upon injuries like those claimed here have been denied in condemnation cases, those cases conflict with the rule in *Carpenter* that all relevant factors must be considered in determining severance damages. While the rule in *Carpenter* may not have been applied in the cases we have cited, Schmidt and Austex argue that it should have been, and that it should be applied in the present cases. The State responds that the cases cited above establish in essence an exception to *Carpenter* for the types of damages claimed in those cases and the present ones.

Despite the broad language in some of the opinions we have cited, and the fact that we have never allowed recovery for severance damages like those claimed here, we are reluctant to hold that such damages can never be recovered. There are other reasons wholly consistent with *Carpenter* why damages should not be allowed for the types of injury Schmidt and Austex claim. We therefore turn to the State's other responses to Schmidt and Austex' *Carpenter* argument.

IV

The State contends that Schmidt and Austex are not entitled to severance damages because the damages they claim did not result from the taking of their property, but from the State's new use of its existing right-of-way and of property taken from other landowners to widen it. We agree.

Section 21.042(c) requires consideration of "the effect of the condemnation on the value of the property owner's remaining property." The effect of the State's condemnation on

each tract in the present cases - that is, the taking of a small strip of property -- is different from the effect of the State's change in Highway 183. The statue allows recovery only for the former.

We recognized this distinction in *State v. Clark*, 161 Tex. 10, 336 S.W.2d 612 (Tex. 1960). There, the State decided to use property dedicated for park purposes as part of the expanded right-of-way for the elevated approach to a high level bridge over a ship channel. The owner of the property abutting the park sued for inverse condemnation. We acknowledged that a landowner has an interest in abutting property dedicated as a park, and that damages could be recovered for the injury to that interest. However, we limited recovery to the diminution in value of the landowner's property due to the State's change in the use of the park, and denied recovery for a diversion of traffic or other consequences of the construction of the project generally. We explained that the landowner was

> only entitled to recover for the diminishment in value of his property caused by the diversion of the parkway to that portion of the elevated structure resting upon the parkway. His damages therefore must be assessed as though the elevated structure already existed . . . and the State acquired this park property only for the purpose of

> widening the elevated roadway. It would be wholly inequitable to allow the [landowner] damages based on the difference in value in his property before and after the completion of the entire project when he would have suffered no recoverable damage if the construction had not been widened to include the parkway in which he asserts an interest.

Id. 336 S.W.2d at 618.

The principle underlying our decision in *Clark* was established by the United States Supreme Court in *Campbell v. United States,* 266 U.S. 368, 372, 45 S.Ct. 115, 117, 69 L.Ed. 328 (1924):

> The rule supported by better reason and the weight of authority is that the just compensation assured by the Fifth Amendment to an owner, a part of whose land is taken for public use, does not include the diminution in value of the remainder caused by the acquisition and use of adjoining lands of others for the same undertaking.

Although the *Campbell* decision was based on the Fifth Amendment, the rule it announced has been followed in most cases in other jurisdictions where the same issue was raised. *See* Annotation, *Compensation for Diminution in Value of the Remainder of Property Resulting from Taking or Use of Adjoining Land of Others for the Same Undertaking,* 59 A.L.R.3d 488 (1974). Although we have never referred specifically to the rule, we applied it in essence in *Clark.*

The Ninth Circuit has held that the *Campbell* rule should be applied unless:

> (1) the land taken from the condemnee landowner was indispensable to the . . .project; (2) the land taken constituted a substantial (not inconsequential) part of the tract devoted to the project; and (3) the damages resulting to the land not taken from the use of the land taken were inseparable from those to the same land flowing from the condemnor government's use of its adjoining land in the . . . project.

United States v. 15.65 Acres of Land, 689 F.2d 1329, 1332 (9th Cir. 1982), *cert. denied*, 460 U.S. 1041, 103 S.Ct. 1435, 75 L.Ed. 793 (1983); *accord, United States v. Pope & Talbot, Inc.,* 293 F.2d 822 (9th Cir. 1961). This exception is based upon the analysis in *Campbell* and employed to allow landowners to recover in the circumstances described by the exception. We agree that this exception is a necessary qualification to the *Campbell* rule. In the present cases it is clear that the diminution in value claimed by Schmidt and Austex in their remaining property is due entirely to the State's modifications to Highway 183 and not to the use of the strip taken from each tract. The diversion of the traffic, circuity of travel, and impaired visibility are all attributable to the conversion of Highway 183 to a controlled access highway. This conversion is to be accomplished, not on the small strips taken

from the Schmidt and Austex tracts, but by changes in the entire roadway. Even the claim of inconvenience

due to construction is based upon activities up and down the roadway and not simply those conducted on the strips taken. These cases do not fit within the exception described in *15.65 Acres:* although the strips taken are indispensable to the project, they do not constitute a substantial part of the property devoted to the project, and the damages resulting to the remaining tracts are not inseparable from those caused by the taking. Accordingly, we conclude that Schmidt and Austex are not entitled to recover the severance damages claimed.

V

The State also contends that the severance damages claimed by Schmidt and Austex are not allowed by section 21.042(d), which states:

> In estimating injury or benefit under Subsection (c), the special commissioners shall consider an injury or benefit that is peculiar to the property owner and that relates to the property owner's ownership, use, or enjoyment of the particular parcel of real property, but they may not consider an injury or benefit that the property owner experiences in common with the general community.

We have not often had occasion to consider what constitutes community damages. We first acknowledged the general principle against awarding community damages in *Gulf, Colorado & Santa Fe Ry. v. Fuller,* 63 Tex. 467 (1885). In that case we affirmed an award to a landowner against the railroad for the reduction in the value of his property due to the operation of trains in the abutting street. We explained:

> If by the construction of a railway or other public work an injury peculiar to a given property be inflicted upon it, or its owner be deprived of its legal and proper use, or of any right therein or thereto; that is, if an injury, not suffered by that particular property or right only in common with other property or rights in the same community or section, by reason of the general fact that the public work exists, be inflicted, then such property may be said to be damaged.
>
> Every government has the power to construct or to cause to be constructed public works, and insofar as such construction works an injury to the public, it can give no one a right to a private action.

Id. at 470.

The principle is far easier to articulate than to define. In *Gainesville, H. & W. R.R. v. Hall,* 78 Tex. 169, 14 S.W. 259 (Tex. 1890), we held that a homeowner's diminution in the value of his property caused by vibration, noise, smoke, noxious vapors and cinders incident to the operation of trains on tracks about 37'

away was not community damages as a matter of law but rather, a question for the jury. In *Texarkana & N.W. R.R. v. Goldberg*, 68 Tex. 685, 5 S.W. 824 (Tex. 1887), we held that a homeowner had not suffered only community damages by construction of railroad tracks in the street abutting his property such that there was room for only one car to pass at a time, and sparks from trains posed a danger to his buildings. There we wrote:

> The fact that the injury was common to all other property holders on the street would not bar the plaintiff's right of recovery. The plaintiff sues for a special damage to his own property by reason of defendant's having impaired the use of the street on which it fronts. It does not affect his right to recovery that his neighbors, the owners of property fronting on the same street, have been injured in the same manner. This is a loss peculiar to plaintiff's property, and not one he suffers in common with the community generally where the property is situated.

Id. 5 at S.W. at 826. Following *Goldberg*, we held in *Powell v. Houston & T. C. R.R.*, 104 Tex. 219, 135 S.W. 1153, 1155-1156 (Tex. 1911), that a landowner suffered more than community damages to his business as a result of the diversion of traffic due to an obstruction on a nearby street to allow for construction of a railroad, even though the street in front of the property remained open, and access by that means was unobstructed.

However, we took a broader view of community damages in the context of highway construction in *Lee v. City of Stratford,* 125 Tex. 179, 81 S.W.2d 1003 (Com.App. 1935).

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Lee claimed that the City's abandonment of streets to allow for construction of railroad tracks near his property made his route to school, the post office, and the main business part of the City more circuitous and difficult. The road abutting his property was not closed, and he retained direct access to it from his property. We affirmed an instructed verdict for the City, stating:

> "if the street directly in front of one's property is not vacated but the portion vacated is in another block, so that he may use an intersecting cross street, although perhaps it is not quite so short a way nor as convenient, it is almost universally held that he does not suffer such a special injury as entitles him to damages. And this is so not-withstanding the new route is less convenient or the diversion of travel depreciates the value of his property. The fact that the lot owner may be inconvenienced or that he may have to go a more roundabout way to reach certain points, it is generally held, does not bring him an injury different in kind from the general public, but in degree only. 'If means of ingress and egress are not cut off or lessened in the block of the abutting owner, but only rendered less convenient because of being less direct to other points in the city, and made so by the vacation of the street in another block, such consequence is damnum absque injuria.'"

Id. at 1004 - 1005 (quoting 4 EUGENE MCQUILLAN, MUNICIPAL CORPORATIONS § 1527, at 279). *Lee* did not cite *Powell* or *Goldberg*.

Speaking more generally in *Ft. Worth Improv. Dist. No. 1 v. City of Ft. Worth*, 106 Tex. 148, 158 S.W. 164 (Tex. 1913), we wrote:

> In the construction of legally authorized public works, it is inevitable that benefits will accrue to the property of some persons and injury will result to that of others. If the injury that thus results from the improvement be only of such nature as is suffered from that cause in common with other property in the same community or section, the damages thus accruing are deemed merely consequential, and no right of action exists. In such cases, it is not considered that the property is "damaged" within the contemplation of the constitutional provision, and the right to compensation is denied. If, however, a public work is constructed which inflicts an injury peculiar to certain property not suffered in common with other property in the community or section, then such property is "damaged" within the meaning of the Constitution, and the law will not permit the infliction of such injury without the allowance of just compensation. . . .
>
> The question in all such cases is resolved by determining whether the injury is peculiar to the property in question, or is only such as is suffered from the same cause in common with other property in the same section or community; that is, whether the property is "damaged" in the true sense of the constitutional provision.

Id. 158 S.W. at 168 - 169.

Section 21.042(d) prohibits consideration of community benefit as well as community injury. We addressed this related concept in *City of Dallas v. Priolo,* 150 Tex. 423, 242 S.W.2d 176 (Tex. 1951), in which a landowner claimed injury to his remaining property after the City took a small strip to widen an abutting highway. In response to the City's argument that the change in the highway actually benefited his property, the landowner contended that any benefit was only that shared by the entire community. We concluded that it could not be held as a matter of law that the straightening of a jog in the highway in front of the landowner's property did not confer a special benefit which was not equally shared by the community.

Community benefit is also relevant when a city assesses landowners for improvements in streets abutting their property. In a case involving a paving assessment, *Haynes v. City of Abilene,* 659 S.W.2d 638 (Tex. 1983), we reviewed the concept of community injury in eminent domain cases, including *Goldberg* and *Priolo,* and concluded that the mere fact that injury was common to everyone on a street would not bar recovery in such cases. Extracting from these cases, we concluded that "special

benefit' connotes an enhancement more localized than a general improvement in community welfare, but not necessarily unique to a given piece of property. A special benefit is one going beyond the general benefit supposed to diffuse itself from the improve ment through the municipality."

Id. at 641 - 642.

In each of these cases, the analysis of whether an injury or benefit was common to the community involved consideration of the location of the landowner's property, the condemnor's project, and the effects of the latter. However, the concept of community injury and benefit is not primarily geographical. It is always true that the injury or benefit from a public project increases with proximity. While injury to several landowners on the same street is not community injury simply because they all suffer alike, it is also not special injury simply because others farther away do not suffer at all. Whether an injury is community cannot be decided simply be setting the size of the relevant area. "Community" in this context means not only where, but, more importantly, what kind. It is the nature of the injury rather than its location that is critical in determining whether it is community.

The diversion of traffic, inconvenience of access, impaired visibility of ground-level buildings, and disruption of construction activities of which Schmidt and Austex complain are, by their nature, a consequence of the change in Highway 183 shared by the entire area through which it runs. While on or more of these elements of injury could affect the Schmidt and Austex tracts in some special, unique way, different from the effect on the surrounding area, there is no claim here that they do. Schmidt and Austex may be impacted more severely than some others in the area, but the difference is one of degree and not of kind. Thus, we agree with the State that the severance damages claimed are not allowed by section 21.042(c).

VI

Schmidt and Austex argue that the difficult process of determining the value of property is made more hypothetical and uncertain whenever relevant factors are excluded from consider ation. As hard as it is to determine the value of property as it exists, it is harder still to determine its value as it might be. For this reason, they argue, the elements of injury asserted in these cases, which unquestionably affect the value of their property,

should be considered in determining damages. While we do not disagree with their assessment of the task of determining value, we cannot allow a recovery of damages not required by the Constitution and section 21.042.

* * * * *

For all the foregoing reasons, we conclude that Schmidt and Austex are not entitled to recover the severance damages they claim. Accordingly, the judgment of the court of appeals is reversed, and the judgment of the trial court is modified to exclude severance damages, and that judgment as modified is affirmed.

NATHAN L. HECHT
Justice

Justice Doggett joins in the judgment only.

OPINION OF THE
THIRD JUDICIAL DISTRICT AT AUSTIN

805 S.W.2d 25 (Tex. App.--Austin 1991)

STATE OF TEXAS AND CITY OF AUSTIN,

APPELLANTS

ROBERT M. SCHMIDT AND RICHARD A. MASSMAN, CO-TRUSTEES OF THE LEON A. SCHMIDT CHILDREN'S TRUST NUMBER ONE,

APPELLEES

No. 3-90-154-CV

Court of Appeals of Texas,
Austin

February 13, 1991

Rehearing Overruled April 3, 1991

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OPINION

In a statutory-condemnation action, the State of Texas and the City of Austin recovered title to a small part of a tract of land owned by Robert M. Schmidt and Richard A. Massman. The trial-court judgment awarded Schmidt and Massman a sum equal to the stipulated market value of the part taken ($7,559.00) plus the depreciation in value of the remainder as found by the jury

($74,880.00). Tex. Prop. Code Ann. § 21.042(b), (c) (1984). The State and the City appeal. We will affirm the judgment.

We refer hereafter to the litigants as Schmidt and the City, omitting any mention of the State and Massman merely for convenience and clarity.

THE CONTROVERSY

Schmidt's parcel adjoins 75 feet of the east right-of-way line of U.S. Highway 183 in Austin. Two tenants operate businesses in a building near the rear of Schmidt's parcel. The area is devoted to commercial uses. An appended drawing illustrates the general circumstances surrounding the controversy. At the present time, motor vehicles may travel rather directly between Schmidt's parcel and the existing traffic lanes of Highway 183.

The City intends, however, to convert Highway 183 to a controlled-access highway. To eliminate grade crossings, the City will raise the main traffic lanes about 37 feet. These elevated lanes will connect at intervals to ramps. The ramps will connect in turn to parallel frontage roads on either side, and by them to the general system of public streets in Austin. After completion of the project, Schmidt's parcel will adjoin one of the frontage

roads. Motor vehicles on the main traffic lanes will then have only indirect passage, via the frontage roads and ramps, to and from Schmidt's tract.

Because of certain federal regulations, the planned conversion of Highway 183 to a controlled-access highway cannot be accomplished unless the existing right-of-way is widened by approximately six feet where it adjoins Schmidt's parcel. To acquire this narrow strip across the front of Schmidt's tract, the City initiated a statutory-condemnation proceeding under Chapter 21 of the Texas Property Code. As indicated in the appended drawing, no structures or parking spaces lie within the narrow strip.

After a hearing, the special commissioners awarded only the market value of the narrow strip in the sum of $7,559.00. Objections having been taken to their award, a trial de novo followed in the county court at law. The parties stipulated that $7,559.00 was the market value of the narrow strip to be acquired by the City. The trial proceeded on Schmidt's claim for injury to the remainder of his tract.

At the conclusion of the evidence, the jury were asked to find the amount of any decrease in the fair market value of the remainder, immediately after the condemnation, considering all of the uses to which the narrow strip will or may be put. They answered $74,880.00. In its final

judgment, the court awarded Schmidt that sum together with the stipulated amount of $7,559.00. The City challenges on appeal the $74,880.00 awarded as damages for injury to the remainder.

The City contends we must reverse the trial-court judgment because that court erroneously admitted evidence of the following: (1) the completed project will require an increased "circuity of travel" between the main traffic lanes and Schmidt's tract; (2) raising the main traffic lanes will divert traffic from the streets and roads serving the Schmidt property at ground level; (3) elevating the main traffic lanes will make Schmidt's tract less visible from the main traffic lanes; and (4) construction activities

associated with the project will interfere with the use of Schmidt's tract during the lengthy period of construction.

1

The City argues that the four factors are not "property" within the meaning of either the condemnation statutes (Tex. Prop. Code Ann. §§ 21.001-.065 (1984 & Supp. 1991)) or the constitutional guarantee that an owner's "property" shall not be taken, damaged, destroyed, or appropriated for public use without compensation (Tex. Const. Ann. art. I, § 17 (1984)). Consequently, the City argues, no compensation can be awarded for the four items, and the evidence showing them was inadmissible because it was irrelevant as a matter of law after the parties

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[1] The parties dispute whether evidence of each of the four factors was actually introduced at trial. Schmidt contends that no evidence was given regarding "circuity of travel" and "diversion of traffic volume." Hence, he contends, we need not consider on appeal whether such evidence was admissible.

> It is perhaps true, as Schmidt contends, that the evidence pertains expressly to two factors only: (1) a decreased visibility of the Schmidt tract, because of the elevation of the main traffic lanes; and (2) an impairment in the use of his tract during the course of the prolonged construction activities. Nevertheless, from our understanding of the record, some evidence more or less implies the other two factors -- "circuity of travel" and "diversion of traffic volume." For purposes of discussion, in any case, we will assume with the City that the evidence pertained to all four factors.

agreed upon the fair market value of the narrow strip, the only "property" acquired by the City in its condemnation action.

We will set out below the particulars of the City's argument. We observe here, however, that the argument mixes indiscriminately the rules which govern two distinctly different elements of a condemnation action: (1) the substantive rules applicable to a determination of whether the owner has a legal right to compensation; and (2) the substantive and evidentiary rules applicable to a calculation of the owner's compensation once he has established a legal right to it. See City of Austin v. Teague, 570 S.W.2d 389, 394 (Tex. 1978); City of Abilene v. Downs, 367 S.W.2d 153, 160 (Tex. 1963). We shall unmix them in the discussion that follows.

AN OWNER'S LEGAL RIGHT TO COMPENSATION

An owner acquires a legal right to compensation when he sustains a legal injury respecting his "property." Under the condemnation statutes, this occurs when a condemnor acquires title to the whole or a part of the owner's "property." (§ 21.012(b)(1), 21.042 - .062). Under the Texas Constitution, this

occurs when the owner's "property" is taken, damaged, destroyed, or appropriated for public use (art. 1, § 17).

The "property" susceptible to condemnation, under the statutes and the constitution, embraces "every estate or use in the land capable of segregation and ownership such as incorporeal hereditaments and other rights and privileges incidental to the land and necessary to a complete title." Rayburn, Texas Law of Condemnation § 48(4), at 136 (1960). See Houston North Shore Ry. Co. v. Tyrrell, 98 S.W.2d 785, 793 (Tex. 1936); McInnis v. Brown County Water Improvement Dist. No. 1, 41 S.W.2d 741, 744 (Tex. Civ. App. 1931, writ ref'd); Moody, Condemnation of Land for Highway or Expressway, 33 Texas L. Rev. 357, 362-67 (1955). Because "property" includes, for condemnation purposes, incorporeal property, in addition to tangible property, the former kinds of property are susceptible to legal injury and a corresponding

legal right to compensation in a condemnation action. See, e.g., Teague, 570 S.W.2d at 394 (right of lawful "development"); State v. Meyer, 403 S.W.2d 366 (Tex. 1966) (right of "access" to public

streets); Downs, 367 S.W.2d 153 (right to use and enjoyment free of "nuisance"); City of Amarillo v. Stockton, 310 S.W.2d 737 (Tex. 1958) (right to "lateral support"); McGee Irrigating Ditch Co. v. Hudson, 22 S.W. 967 (Tex. 1893) ("riparian" right to take water). As pointed out below, however, not every incident of land ownership rises to the dignity of "incorporeal property." The term "incorporeal property" includes only those incidents of land ownership which the law does recognize as legally enforceable rights or choses in action.

In a statutory-condemnation action, the condemnor's petition may expressly claim or deny an intention to acquire certain incorporeal property, or the parties may dispute whether incorporeal property is necessarily encompassed in the taking of the owner's physical land under the facts and circumstances of the particular case. See, e.g., State v. Frost, 456 S.W.2d 245, 256 (Tex. Civ. App. 1970, writ ref'd n.r.e.) and State v. Meyers, 292 S.W.2d 933, 936 (Tex. Civ. App. 1956, writ ref'd n.r.e.) (right of "access" to public streets).

In an inverse-condemnation action, the owner may sue for compensation on allegations that his incorporeal property has in

fact been taken, damaged, destroyed, or appropriated for public use. See, e.g., City of Austin v. Avenue Corp., 704 S.W.2d 11 (Tex. 1986) (right of "access" to public streets). To establish his legal right to compensation, however, the owner must first establish two subsidiary propositions: (1) that his affected interest is indeed incorporeal property, or a legally recognized and enforceable right or chose in action; and (2) that such property has, by the defendant's actions, been taken, damaged, destroyed, or appropriated for public use. McNamara, Inverse Condemnation: A Sophistic "Miltonian" Bog, 31 Baylot L. Rev. 443 (1979).

An owner of land may establish that, in yet another way, he has sustained a legal injury respecting his "property," giving rise to a corresponding legal right to compensation for the injury. Such an injury may occur when the actions taken by a public authority, within its own property limits, subject the owner's adjoining land to an additional servitude, charge, or burden -- the nuisance in Downs, for example. More to the point in the present case, such an effect may occur because of actions taken by a public authority within the physical right-of-way through which its road passes. Having once acquired the right-of-way, a

public authority may ordinarily raise or otherwise alter the road without thereby violating any legal right held by the owner of adjoining land, even though this may seriously diminish the attractiveness of the adjoining land and interfere with the owner's convenience and use of it, thus reducing its value. State v. Brewer, 169 S.W.2d 468 (Tex. 1943). The theory of this general rule of non-liability rests upon the premise that such changes were reasonably foreseeable when the right-of-way was originally acquired, at which time the right to compensation was necessarily determined for all time. But the general rule of non-liability does not apply when the public authority cannot accomplish the improvement or alteration within the original right-of-way, and must acquire additional strips of the owner's adjoining land to accommodate the project. In those instances, the "proper test" for determining the issue of legal injury and right to compensation "is whether the newly acquired right-of-way imposes burdens on the abutting property which did not exist under the old right-of-way." Milam County v. Akers, 181 S.W.2d 719, 722 (Tex. Civ. App. 1944, writ ref'd w.o.m.). Moreover, "an additional burden or servitude" is imposed as a matter of law when "construction is not

feasible or is impractical upon the old right-of-way, and the new acquisition is essential to it." Id. When this is the case, as it is here, acquisition of the additional strips of land through condemnation creates in the owner a legal right to compensation for any reduction in

the value of his remaining property. Id. In a similar way, an owner who purchases his land in reliance on a dedication of adjoining land for park purposes may acquire a legal right to compensation for a loss of market value when the dedication is changed to permit the construction of a ramp leading to an elevated bridge. State v. Clark, 336 S.W.2d 612 (Tex. 1960).

The theory of the City's argument in the present case is as follows: The four factors did not amount to incorporeal property taken or damaged by the planned conversion of the road to a controlled-access highway. The City concedes that a landowner has an incorporeal property right denominated the right of "access," or the right of passage between his tract and the public streets. But under the applicable law, the threshold of that property interest is a "material and substantial" interference with

such passage, determinable as a matter of law; and when the interference amounts merely to a greater "circuity of travel" no legal right to compensation arises in the owner. Such is the case here because, under the undisputed evidence, Schmidt's tract will open onto the new frontage road from which passage may be had to and from the city streets and the main traffic lanes of the elevated highway. As a matter of law, therefore, Schmidt was not injured in his property right of "access." State v. Wood Oil Distributing, Inc., 751 S.W.2d 863 (Tex. 1988); City of San Antonio v. Olivares, 505 S.W.2d 526 (Tex. 1974); City of Waco v. Texland Corporation, 446 S.W.2d 1 (Tex. 1969); City of Beaumont v. Marks, 443 S.W.2d 253 (Tex. 1969); City of Houston v. Fox, 444 S.W.2d 591 (Tex. 1969); DuPuy v. City of Waco, 396 S.W.2d 103 (Tex. 1965); Archenhold Automobile Supply Co. v. City of Waco, 396 S.W.2d 111 (Tex. 1965); State v. Baker Bros. Nursery, 366 S.W.2d 212 (Tex. 1963); L-M-S, Inc. v. Blackwell, 233 S.W.2d 286 (Tex. 1950).

The City argues next that no landowner has an incorporeal property right in the volume of traffic which passes customarily in the street abutting his business property, and, under the

applicable law, a public authority may reduce that volume traffic controls or an alteration of a road or a street network without incurring any liability to the owner when his business patronage suffers as a result. The City relies on the following cases in support of its argument: Fox, 444 S.W.2d at 593; Pennysavers Oil Company v. State, 334 S.W.2d 546, 549 (Tex. Civ. App. 1960, writ ref'd). Indeed, business losses are not compensable at all under the condemnation statutes and the constitution. State v. Travis, 722 S.W.2d 698 (Tex. 1987), cert. denied, 484 U.S. 818; State v. Zaruba, 418 S.W.2d 499, 502 (Tex. 1967); City of Dallas v. Priolo, 242 S.W.2d 176, 179 (Tex. 1951). Therefore, the City contends, the conversion of the highway to a controlled-access highway--the rerouting of traffic, the elevation of the main traffic lanes bearing the greater traffic volume, and the obscuring of Schmidt's tract by that elevation -- did not injure Schmidt in any right of property which the law recognizes and enforces.

Finally, the City argues that a landowner has no incorporeal property right to be free of the annoyance and inconvenience of ordinary construction occurring within the public right-of-way when these do not rise to the level of a nuisance.

These adverse consequences are not peculiar to the owner but are those of the community in general. Consequently, the City asserts, the owner has no legal right to recover compensation for them. The City cites Ft. Worth Improvement Dist. No. 1 v. City of Ft. Worth, 158 S.W. 164 (Tex. 1913); G.,C., & S.F. Ry. Co. v. Fuller, 63 Tex. 467 (1885); City of Dallas v. Lawlet, 287 S.W. 137 (Tex. Civ. App. 1926, writ ref'd); Hall v. Wilbarger County, 37 S.W.2d 1041 (Tex. Civ. App. 1931) aff'd. 55 S.W.2d 797 (Tex. Corem. App. 1932).

The rules of law argued by the City are unassailable in the abstract, but they demolish claims and theories that Schmidt never advanced in the case by pleading or evidence. Schmidt did not claim a legal right to compensation on a theory that his incorporeal property had been taken or damaged in the condemnation,

i.e., his property right of "access" or any other incorporeal property right one might infer from the four factors. Schmidt claimed, instead, a legal right to compensation for an injury sustained by him in his physical property alone -- the parcel of

land remaining in his ownership after the taking of the narrow strip. He claimed this legal right on two indisputable grounds: (1) the statutory right, given in § 21.042(c), which entitles an owner to recover for any injury resulting from a taking of a part of his property by condemnation, expressly including any adverse "effect of the condemnation on the value of [his] remaining property"; and (2) the common-law right, described and applied in Akers, 181 S.W.2d at 722, which entitles an owner to recover for any injury resulting from a taking of a part of his property, including a reduction in the market value of his remaining property, when the taking is essential to accommodate a public project within an adjoining right-of-way.

The authorities cited in the City's argument are thus irrelevant, for they deal with whether a particular incident of land ownership was indeed, as the owner claimed, incorporeal property -- a legal right that the law recognized and enforced as a right of "property."[2]

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[2] The decision in State v. Baker Bros. Nursery, 366 S.W.2d 212 (Tex. 1963), is an exception. There the court approved the trial court's pre-trial suppression of evidence of any circuity of travel occasioned by the conversion of a road to a controlled-access highway, and any reference by counsel or evidence concerning the direction of the flow of travel upon the new highway. Baker Bros. Nursery, 366 S.W.2d at 214. The court noted that the case was not one "where all

Schmidt's evidence was not adduced on that theory, and that is not the proper context in which to determine the admissibility of his evidence. Rather, he adduced evidence of the four factors to explain the basis for opinion testimony given by his expert witnesses that the market value of his remaining property had been reduced. The theory of such evidence was that these four

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access to the new highway was denied, but a case where each remaining tract had access to the highway through the frontage roads alongside and parallel to the highway." Id. This was said in connection with a claim that the market value of the remainder was reduced by the project. The case is directly in point in the present case. Shall it control? We believe not for the following reasons.

> The opinion in Baker Bros. Nursery omits to mention the Supreme Court's earlier indication that such evidence would be admissible in a statutory-condemnation action, as distinguished from an inverse-condemnation action. State Highway Commission v. Humphreys, 58 S.W.2d 144, 146 (Tex. Civ. App. 1933, writ ref'd); City of San Antonio v. Pigeonhole Parking of Texas, 311 S.W.2d 218, 219 (Tex. 1958). More importantly, however, Baker Bros. Nursery was no more than an aberration, a temporary diversion, as the Supreme Court developed the precise limits of the incorporeal-property right of "access"; and, following Baker Bros. Nursery the "court firmly reestablished that existing access is a property right that cannot be taken, damaged, or destroyed without adequate compensation, particularly in a "statutory-condemnation action. Rayburn, Legal Rights and Legal Fictions in Condemnation, 10 Hous. L. Rev. 251, 255 (1973) (emphasis added). As noted by the author, the right was reestablished in State v. Meyer, 403 S.W.2d 366 (Tex. 1966), to be refined subsequently by decisions arriving ultimately at the "substantially impaired" test suggested in Stoebuck, The Property Right of Access Versus the Power of Eminent Domain, 47 Texas L. Rev. 733 (1969). Rayburn, supra, at 254-56. This is essentially the test applied, of course, in Avenue Corp., 704 S.W.2d 11.
>
> In effect, the principle of Baker Bros. Nursery has been overruled by implication in the several Supreme Court decisions leading up to Avenue Corp.

factors would enter into the considerations of a willing buyer and willing seller attempting to negotiate a price for the remaining property. This is the proper context in which to consider the admissibility of Schmidt's evidence, and to that we now turn.

CALCULATION OF AN OWNER'S COMPENSATION

We start with this bedrock principle: "The objective of the judicial process under the constitution and statutes is to make the landowner whole and to award him only what he could have obtained for his land in a free market." City of Fort Worth v. Corbin, 504 S.W.2d 828, 831 (Tex. 1974).

The basic substantive rules are set out in § 21.042. For land actually acquired by the condemnor, whether the whole or a part of a tract, the owner is entitled to the fair market value of the land. § 21.042(b).

The fair market value of the narrow strip was fixed by the parties' stipulation at $7,559.00. We need not refer to it further.

When a condemnation action severs an owner's land by the condemnor's acquisition of only a part of it, the owner may be entitled to an additional sum to compensate for any resulting

injury sustained by him. To determine whether there is an injury, the fact finder must estimate from the evidence the extent of any "injury and benefit to the property owner" resulting from the condemnation, "including the effect of the condemnation on the value of [his] remaining property." § 21.042(c) (Emphasis added). In arriving at these two estimates, the fact finder may include in its consideration any "injury or benefit that is peculiar to the property owner and that relates to [his] ownership, use, or enjoyment of" his remaining property; however, the fact finder must exclude from consideration any "injury or benefit that the property owner experiences in common with the general community." § 21,042(d) (Emphasis added).

Section 21.041 declares certain categories of evidence to be admissible "[a]s the basis for assessing actual damages" under the foregoing substantive rules for calculating compensation. The categories refer to evidence showing (1) the value of the land take:., (2) the injury to the owner, (3) the benefit to his remaining property, and (4) the use of the property for the purpose of the condemnation.

It is readily apparent that the terms of §§ 21.041 and 21.042 are quite general in their reference to such things as "injury," "benefit," "ownership, use, or enjoyment," and the "effect of the condemnation on the value of [the] remaining property." Not surprisingly, these terms have been the subjects of judicial interpretation on more than a few occasions.

The key interpretations and distinctions were set out explicitly, after careful analysis, in State v. Carpenter, 89 S.W.2d 194 (Tex. 1936). We shall mention only those applicable here.

1. The ultimate question is "one of proof as to market value and depreciation in market value, rather than to abstract questions as to what may or may not be considered by the jury in assessing damages." Carpenter, 89 S.W.2d at 199. "Market value" is defined ordinarily in terms of what the land would bring in a transaction between a willing seller and 8 willing buyer. City of Austin v. Cannizzo, 267 S.W.2d 808, 812 (Tex. 1954); Carpenter, 89 S.W.2d at 201-202.

2. In general, "it is proper as touching the matter of the value and depreciation in value to admit evidence upon all such matters as suitability and adaptability, surroundings,

conditions before and after and all circumstances which tend to increase or diminish the present market value." Carpenter, 89 S.W.2d at 200 (Emphasis added). The extremely broad scope of admissible evidence implied by this language has been repeatedly reaffirmed in reference to the "test" of what a willing seller and willing buyer would consider in arriving at a negotiated price for the property. See, e.g., State v. Schaefer, 530 S.W.2d 813, 816-17 (Tex. 1975) ("In the willing seller-willing buyer test of market value it is frequently said that all factors should be considered which would reasonably be given weight in negotiations between a seller and a buyer.") (citing Cannizzo, 267 S.W.2d at 814); Corbin, 504 S.W.2d at 830 ("In determining the landowner's just compensation for what is taken from him, the fact finder is entitled to consider every factor affecting the price which the prudent and willing buyer and seller would exchange for the property."); City of Pearland v. Alexander, 483 S.W.2d 244, 246 (Tex. 1972) ("lilt is proper to admit evidence upon all matters which tend to increase or diminish the present market value."); Sample v. Tennessee Gas Transmission Co., 251 S.W.2d 221, 224 (Tex. 1952) (In proving value, the court should admit "everything

which has a bearing on the value of the property."); Brazos River Conservation and Reclam. Dist. v. Costello, 169 S.W.2d 977, 986 (Tex. Civ. App. 1943, writ ref'd w.o.m.) ("In order to enable the jury to determine the depreciation

of the remainder, the parties have the right to introduce evidence of everything which would tend to affect the value of the land in the estimation of a proposed purchaser or would tend to make it more or less valuable to the present owner."). The scope of admissible evidence is qualified, however, by the following rule from Carpenter.

3. "Evidence should be excluded [when it relates] to remote, speculative, and conjectural uses, as well as injuries, which are not reflected in the present market value of the property." Carpenter, 89 S.W.2d at 200; see also Teague, 570 S.W.2d at 395 (adverse effects of condemnation must be reasonably certain as opposed to mere possibilities); Spindor v. Lo-Vaca Gathering Company, 529 S.W.2d 63, 65 (Tex. 1975) (recovery may be had in condemnation proceedings for injuries to the remainder which are reasonably foreseeable at the time of

condemnation); Heddin v. Delhi Gas Pipeline Company, 522 S.W.2d 886, 888 (Tex. 1975) (reduction in market value of remainder, attributable to fear in minds of buying public, may be shown when fear results from actual danger or when fear is otherwise reasonable); ALexander, 483 S.W.2d at 246-47 (constitution requires compensation only for probable future injuries affecting market value); Texas Electric Service Company v. Campbell, 336 S.W.2d 742, 744-45 (Tex. 1960) (injuries that are mere possibilities are not compensable). Application of the rule to conjectural uses is illustrated in State v. Walker, 441 S.W.2d 168 (Tex. 1969), in which the court held that any reduction in the market value of the remainder must be determined in reference to the actual use made of the property at the time of condemnation, as opposed to a hypothetical "highest and best use" that may or may not be made of the remainder in the future. The rule against remote, speculative, and conjectural injuries applies particularly to lost business profits, as illustrated by the distinctions drawn under the next rule from Carpenter.

4. "If the [expert] witness answers that there has been a depreciation or an enhancement in the market value after the

taking, in either event it is proper to question him as to the basis of his opinion and the matters he has taken into consideration in arriving at his opinion." Carpenter, 89 S.W.2d at 201. This is, of course, a familiar aspect of examining and cross-examining any expert witness as to his opinion. But the rule involves an important distinction. In Priolo, the expert witness was asked to give his opinion concerning the effect of a partial taking upon the business which was conducted on the owner's remainder. The Court noted that his answer would have been admissible had he been asked his opinion concerning the effect of a partial taking upon the market value of the remainder. But the Court held the trial court properly excluded his answer because the question inquired explicitly about the effect of the partial taking upon the business and injuries to business, and such injuries are not compensable under the condemnation statutes:

> "The theory upon which the hypothetical question was propounded to the witness . . . was not to establish one of the factors in estimating the value of the part remaining, but was to establish a separate and independent item of recovery.

Priolo, 242 S.W.2d at 179. The same distinction was applied in Travis, 722 S.W.2d at 698-99, and Zaruba, 418 S.W.2d at 503.

5. "If [the expert witness] should testify that among the things he has considered in arriving at his opinion of market value were 'community' benefits or injuries, but that there were other things of a legitimate nature which influenced his opinion, this should not invalidate his evidence altogether." Carpenter, 89 S.W.2d at 201. The Court preceded this rule by noting "that a trial court in the admission and exclusion of evidence cannot eliminate all evidence of 'community' benefits and injuries as touching questions of value and depreciation in value"; conse quently, it was better, as the court concluded, to handle those matters by instructions and by the framing of queries submitted to the jury. Id.

It remains then to apply these rules in the present case. The City complains of the admission of evidence showing the four factors. The witnesses cited these factors in explanation of their opinions that the partial taking reduced the market value of Schmidt's remainder: each factor would enter into the minds of a willing buyer and willing seller attempting to arrive at a negotiated price. We cannot say that these four factors would

not, as a matter of law, be considered by willing buyers and sellers. The evidence was not adduced in a way to imply that Schmidt claimed a legal right to recover compensation for the four factors as such, as occurred in Proilo. Instead, the evidence was adduced in a manner expressly authorized by Priolo -- to show the factors that a willing buyer and willing seller would consider in arriving at an agreed price for the remainder, given its present use as commercial rental property.

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[3] For example, Schmidt's witness Jack Holford, a "development consultant," testified as follows concerning the factors that a prospective retail tenant would consider in deciding whether to lease space in a building:

> [If the tenants are] looking for a free-standing retail site, one of the first things they're going to look for is the traffic counts along the roadway where they're looking. . . .They're going to try to find a location -- that location, wherever they find it, needs to have access from that street or road so that you can get into and out of the property. You need to be visible. Obviously, the tract of land has to be seen and visible, and the building is going to be placed there to be in such a manner that it can be seen.
>
> • • •
>
> So all of those criteria go into making up what a potential tenant -- a potential purchaser of a site, or tenant of a site, would want to have in order to have a stand-alone retail type of business.

Schmidt's witness Larry Beard, a real-estate appraiser, testified that the best way to estimate the market value of a commercial tract such as the Schmidt property was to use the "income approach," or an estimate based on the rental income the property would generate.

We believe, therefore, that the trial court did not err in admitting the evidence. We are bound so to hold by the explicit statements in Carpenter, Schaefer, Corbin, Alexander, Sample, and Cannizzo, declaring in effect that the scope of admissible evidence is coextensive with the factors that would reasonably bear upon the negotiations between a willing buyer and willing seller in reaching an agreed price for the property. Any other holding would be contrary to those decisions.

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[4] Referring to the Supreme Court opinions in Carpenter, Sample, and Cannizzo, and similar opinions, Rayburn wrote as follows:

> These opinions, generation after generation, have shown that in condemnation cases we are dealing with elements of value and elements of damage and that any fact (yes, even circuity of travel to and from property) that makes the remaining land less valuable, or any fact that benefits or makes it more valuable, is and should be admissible on trial. . . .
>
> So long as we continue to measure the damages or value of remainder land by its before and after market value, by the willing seller-willing buyer concept, which is purely an economic one, then it is inescapable that good access or bad access, a high or low traffic count, a good central location or a poor inaccessible location, utilities or no utilities, corner or no corner, one-way or two-way traffic, and no access or impaired access have been and always will be economic factors that a buyer or seller will take into monetary account when they go into the market place to buy or sell. Location is the keystone and soul of the economics of market value of lands that are the subject of property ownership. . . .

Rayburn, supra, at 259.

[4] The City's contention that such evidence was inadmissible is actually a rather naked attack upon the solidly established rule that market value may be defined in terms of the willing buyer-willing seller "test." We are not free to disregard that rule.

The wide scope of admissible evidence, under Carpenter and the other authorities, is of course qualified by the corollary that evidence is not admissible when it pertains to uses and injuries that are only speculative, conjectural, or remote. But nothing in the present record suggests that any of the four factors were of that character.

Concerning the effect construction activities would have upon the market value of Schmidt's tract during the period of construction, we concede it is difficult to classify any particular injury as "community" or "special." See Kendall, Special and Community Damages--A Confusion in Definition, 10 Hous. L. Rev. 282, 289-90

(1973). We refer, however, to the warning in Carpenter that it is impractical to exclude such evidence on an item-by-item basis, but prejudice to the condemnor may be avoided by instructions and

by proper framing of queries submitted to the jury. In the present case, the evidence regarding such activities was mixed with the other factors mentioned above, and the latter were proper to be considered by the jury. We therefore hold the trial court did not err in admitting the evidence regarding the effect of the construction activities.

We are not unmindful that testimony may be framed artfully to come within what Carpenter and the other decisions hold admissible. We observe, however, that the reality of any effect upon the market value of the landowner's property remains open to contrary evidence and argument.

In determining the legal issue of admissibility, moreover, it is not our concern that the payment of compensation may be expensive, even prohibitively so, to the condemnor. The issue of what level of expense is acceptable in connection with public works is a matter placed exclusively in the legislative and executive departments of government. Rayburn, Condemnation--Legal Rights and Legal Factions, 10 Hous. L. Rev. 251, 260 (1973). And in any event, the condemnor is free to reverse its decision to acquire the property, following a trial which fixes the

amount of compensation payable, so long as the owner is made whole in connection with the condemnor's decision to dismiss its statutory condemnation action, as provided in § 21,019.

Finding no reversible error as assigned, we affirm the trial-court judgment.

John Powers, Justice

Existing R.O.W.
N
6' strip
Parking
75'
U.S. HIGHWAY 183
Fairfield Drive
Existing R.O.W.

Supreme Court, U.S.
FILED
JUN 1 1994
OFFICE OF THE CLERK

(2)

NO. 93-1761

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ROBERT M. SCHMIDT AND RICHARD A. MASSMAN,
CO-TRUSTEES OF THE
LEON A. SCHMIDT CHILDREN'S TRUST NO. 1,
Petitioners

v.

STATE OF TEXAS AND CITY OF AUSTIN,
Respondents

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF TEXAS

BRIEF IN OPPOSITION

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38 pp

QUESTIONS PRESENTED FOR REVIEW

Does the United States Supreme Court have jurisdiction to review the final judgments of the Supreme Court of the State of Texas pursuant to 28 U.S.C. §1257(a) (1988) where the Texas Supreme Court has neither passed on the federal constitutional issues urged before this Court nor were those issues properly raised in the State court?

Did the Texas Supreme Court, in adopting the rule of the United States Supreme Court announced in *Campbell v. United States*, 266 U.S. 368 (1924), violate the Just Compensation Clause of the Fifth Amendment or the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

LIST OF PARTIES

Respondents adopt the statement of Petitioners with respect to the parties as they appeared before the Supreme Court of Texas.

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NO. 93-1761

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ROBERT M. SCHMIDT AND RICHARD A. MASSMAN,
CO-TRUSTEES OF THE
LEON A. SCHMIDT CHILDREN'S TRUST NO. 1,
Petitioners

v.

STATE OF TEXAS AND CITY OF AUSTIN,
Respondents

PETITION FOR WRIT OF CERTIORARI TO
THE SUPREME COURT OF THE STATE OF TEXAS

BRIEF IN OPPOSITION

OPINIONS BELOW

The "Opinions Below" section of the Petition For Writ of Certiorari accurately summarizes the lower court proceedings.

NO JURISDICTION

Respondents object to Petitioners' Statement of Jurisdiction.[1] This Court lacks jurisdiction to review the Texas Supreme Court judgment because it was based entirely upon Texas statutory law and judicial precedent. The Petitioners did not raise, in any Texas court, the federal constitutional issues they complain of now until their motion for rehearing to the Texas Supreme Court, which was overruled without comment.[2] Under Texas law, a

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[1] Pet. at 2.

[2] Res. App.

constitutional challenge must be made at the trial court level unless the challenge constitutes fundamental error. *Pedraza v. Tibbs*, 826 S.W.2d 695, 698 (Tex. App.--Houston [1st Dist.] 1992, writ denied); *Thompson v. Ereckson*, 814 S.W.2d 805, 808 (Tex. App.--Waco 1991, no writ); *Johnson v. Lynaugh*, 800 S.W.2d 936, 939 (Tex. App.--Houston [14th Dist.] 1990, writ denied). Moreover, in the absence of fundamental error, a constitutional challenge may not be raised for the first time in the Texas Supreme Court, especially on motion for rehearing. *Johnson v. Lynaugh*, 796 S.W.2d 705, 707 (Tex. 1990); *Aetna Life Ins. Co. v. Wells*, 566 S.W.2d 900, 901 (Tex. 1978); *Watson v. Glen Falls Ins. Co.*, 505 S.W.2d 793, 797 (Tex. 1974); Tex. R. App. P. 131(e) and 190(b). Petitioners are not even asserting fundamental error. "Fundamental error survives today in those rare instances in which the record shows

the court lacked jurisdiction or that the public interest is directly and adversely affected as that interest is declared in the statutes or the Constitution of Texas." *Pirtle v. Gregory*, 629 S.W.2d 919, 920 (Tex. 1982). Under the circumstances presented here, 28 U.S.C. §1257(a) (1988) does not confer jurisdiction on this Court.

This Court addressed these very jurisdictional issues in *Yee v. Escondido*, __ U.S. __ (1992), 112 S.Ct. 1522 (1992). In *Yee*, petitioners attempted to raise a substantive due process claim for the first time in their petition for review which was denied by the California Supreme Court. Noting that petitioners did not raise a substantive due process claim in the state courts and that no state court had addressed such a claim, this Court held that it

> has, with very rare exceptions, refused to consider petitioners' claims that were not raised or

> addressed below. *Illinois v. Gates*, 462 U.S. 213, 218-220, 103 S.Ct. 2317, 2321-2323, 76 L.Ed.2d 527 (1983). While we have expressed inconsistent views as to whether this rule is jurisdictional or prudential in cases arising from state courts, see *ibid.*, we need not resolve the question here. (In cases arising from federal courts, the rule is prudential only. See, *e.g.*, *Carlson v. Green*, 446 U.S. 14, 17, n. 2, 100 S.Ct. 1468, 1470, n. 2, 64 L.Ed.2d 15 (1980).) Even if the rule were prudential, we would adhere to it in this case. Because Petitioners did not raise their substantive due process claim below, and because the state courts did not address it, we will not consider it here. *Id.* at 1531.

This Court should be even more reluctant to accept jurisdiction, where, as in the instant case, separate, compelling and long-standing state law authorities, both statutory and by judicial precedent, support the Texas Supreme Court decision. For example, an independent and adequate state law ground will defeat this Court's jurisdiction *even where a question of*

federal law is decided by a state court (which is, of course, denied here by Respondents). *Coleman v. Thompson*, __ U.S. __, __ (1991); 111 S.Ct. 2546, 2553-54 (1991), *citing Fox Film Corp. v. Muller*, 296 U.S. 207, 210, (1935); *Klinger v. Missouri*, 13 Wall. 257, 263, 20 L.Ed 635 (1872).

RESPONSE TO PETITIONERS' STATEMENT

Prior to the taking, Petitioners' tract of land was situated on United States Highway 183 ("U.S. 183"). At that time, U.S. 183 consisted of six lanes of traffic, three each for northbound and southbound traffic. The northbound and southbound lanes were separated by a grassy median. Approximately ten years prior to trial, the City Council of Austin, Texas petitioned the Texas Department of Transportation to

alleviate traffic congestion on U.S. 183. An approximate six-foot wide strip of Petitioners' land was acquired to meet federal guidelines for highway construction, although no structures or parking spaces were constructed on the part taken. The highway improvement project will improve U.S. 183 such that local traffic will be able reach adjacent properties, including Petitioners' property, through a system of frontage or access roads consisting of three southbound and three northbound lanes. The access roads are virtually identical to the original U.S. 183 except that they will be curbed and guttered.

Six through highway lanes or "main lanes" will be elevated approximately 37 feet above ground level at the Petitioners' property. A system of entry and exit ramps will connect the access roads to the main lanes.

At trial, Petitioners and Respondents stipulated to the value of the part taken and the case was tried on the issue of the damages, if any, to the remaining property. Evidence was admitted, over Respondents' objections, pertaining to damages Petitioners alleged were due to (1) diversion of traffic, (2) increased circuity of travel to the property, (3) lessened visibility to passersby, and (4) inconvenience of construction activities.

Respondents denied any such compensable damages and adduced testimony that the value of the remaining land was $367,441.00 before and after the taking (no diminution in the value of the remainder). Petitioners testified that their remaining land was worth $117,455.00 less as a result of the proposed highway improvements. Both Petitioners' and Respondents' real estate value experts testified that the entire

tract had a market value of $375,000.00 prior to the taking. The jury found damages to the remaining property in the amount of $74,880.00 and Respondents appealed.

The Third District Court of Appeals at Austin affirmed. Application for Writ of Error was made by Respondents to the Texas Supreme Court on the jurisdictional ground that there was a conflict between the Third District Court of Appeals decision in this case and that of the First District Court of Appeals in *Olson v. Harris County*, 807 S.W.2d 594, 595 (Tex. App.--Houston [1st Dist.] 1990, writ denied). Application for Writ of Error was granted.

Citing authorities spanning more than 100 years of Texas jurisprudence, a unanimous Texas Supreme Court reversed the judgment of the Third Court of Appeals and modified the judgment of the trial court to exclude community damages. Petitioners

attempted to raise the federal constitutional issues complained of here, for the first time, on motion for rehearing which was overruled without comment on February 2, 1994.[3]

Respondents except to Petitioners' characterization of the factual record in the following particulars:

1) There was no evidence as to the existence of "mountainous piles of dirt" at, or to be placed in front of, the Petitioners' property as a result of the project.[4]

2) There was no evidence of the retail building located on the remainder being "so close to the elevated structures that it will appear as if 'inside a cavern'."[5]

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[3] Res. App.

[4] Pet. at 4.

[5] Pet. at 4.

3) The jury did not find the value of the part taken to be $7,559.00. This was stipulated by counsel for the parties before trial.[6]

4) Petitioners' characterization of the Texas Supreme Court's holdings[7] are not accurate. The Texas Supreme Court held that the damages claimed by Petitioners did not amount to a taking or damaging of property that is compensable in an inverse condemnation case; that the general rule in inverse condemnation cases and condemnation cases has been the same with respect to the elements of injury; that it had never allowed recovery for severance damages like those claimed by Petitioners; that the damages claimed by Petitioners did not result from the taking of their property, but from the State's new use of its

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[6] Pet. at 5.

[7] Pet. at 5.

existing right-of-way and of property taken from other landowners to widen it and, hence, not recoverable under the Texas statute pertaining to damages recoverable in condemnation cases; and that the damages claimed by Petitioners were community in nature and, therefore, not compensable under the Texas statute pertaining to damages recoverable in condemnation cases.

REASONS FOR DENYING WRIT OF CERTIORARI

I. THE TEXAS SUPREME COURT DECISION WAS BASED ENTIRELY ON STATE LAW.

A unanimous Texas Supreme Court adopted the federal rule announced by this Court in *Campbell v. United States*, 266 U.S. 368 (1924). This being so, it can hardly be seriously argued that this Court's criteria for granting certiorari

have been met. Sup. Ct. R. 10, 28 U.S.C. (1994). Not only do Petitioners misconstrue *Campbell* in urging this Court's grant of certiorari, but they likewise ignore the fact that the Texas Supreme Court's decision rested not on *Campbell* but on §21.042(c) of the Texas Property Code,[6] its prior decision in *State v. Clark*, 336 S.W.2d 612 (Tex. 1960) and a myriad of Texas Supreme Court and appellate decisions construing §21.042(c) and (d) of the Texas Property Code in the context of community injury and benefit. *State v. Schmidt*, 867 S.W.2d 769, 777, 781 (Tex. 1993). Perhaps the best way of demonstrating the unsoundness of Petitioners' arguments is to examine the Texas statute defining the damages to which a condemnee is entitled,

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[6] Tex. Prop. Code Ann. §21.042(c) (Vernon 1984).

§21.042 of the Texas Property Code.' Subsection (c) provides in pertinent part, "the special commissioners shall determine the damage to the property owner after estimating the extent of the injury and benefit to the property owner, including *the effect of the condemnation* on the value of the property owner's remaining property." Tex. Prop. Code Ann. §21.042(c) (Vernon 1984). (Emphasis added).

Subsection (d) provides in its entirety: "[i]n estimating injury or benefit under Subsection (c), the special commissioners shall consider an injury or

---

' It is noted by respondents that Petitioners represent in their appendix at page A3 that §21.042(e) of the Texas Property Code was declared unconstitutional. Such is not the case. The Texas decision in *State v. Enterprise Co.*, 728 S.W.2d 812, 813 (Tex. App.--Houston [14th Dist.] 1986, writ denied) held that to the extent the language contained in this subsection is suggestive that the Legislature might have intended to change the method for determining adequate compensation for land condemned for highway purposes by allowing a reduction to a Condemnee's compensation for the part taken equal to the estimated benefits to the condemnee's remaining property, it is inconsistent with the Texas Supreme Court's interpretation of the pertinent state Constitutional provision.

benefit *that is peculiar to the property owner* and that relates to the property owner's ownership, use, or enjoyment of the particular parcel of real property, but *they may not consider an injury or benefit that the property owner experiences in common with the general community.*" *Id.* at §21.042(d). (Emphasis added). These statutes are the foundation upon which the entire body of Texas law rests in condemnation cases involving partial takings. It was the application of these statutes which compelled the decision of the Texas Supreme Court below.

Petitioners err when they state, at page 6 of their Petition for Writ of Certiorari, "[n]or does this Petition ask this Court to determine whether or not damage to property value was sustained *by virtue of the taking* as such *is not challenged by the State.*" (Emphasis added). To the contrary, whether or not damage to

property value was sustained by virtue of the taking is the only question of import and it is challenged by Respondents here as it was in the courts below. As noted by the Texas Supreme Court:

> The State contends that Schmidt and Austex are not entitled to severance damages because the damages they claim did not result from the taking of their property, but from the State's new use of its existing right-of-way and of property taken from other owners to widen it. We agree.
>
> Section 21.042(c) requires consideration of "the effect of the condemnation on the value of the property owner's remaining property." *The effect of the State's condemnation on each tract in the present cases--that is, the taking of a small strip of property--is different from the effect of the State's change in Highway 183. The statute allows recovery only for the former. Schmidt, 867 S.W.2d at 777, 778.* (Emphasis added).

Similarly, the Texas Supreme Court held that the damages complained of by Petitioners were not an "effect of the condemnation on the value of the property

owner's remaining property" within the cognizance of §21.042(c) because they are not allowed by §21.042(d). *Id.* at 781. As stated by the court:

> The diversion of traffic, inconvenience of access, impaired visibility of ground-level buildings, and disruption of construction activities of which Schmidt and Austex complain are, by their nature, a consequence of the change in Highway 183 shared by the entire area through which it runs. While one or more of these elements of injury could affect the Schmidt and Austex tracts in some special, unique way, different from the effect on the surrounding area, there is no claim here that they do. Schmidt and Austex may be impacted more severely than some others in the area, but the difference is one of degree and not of kind. Thus, we agree with the State that the severance damages claimed are not allowed by §21.042(c). *Id.*

Thus, it was Texas law which was and is determinative of the issues presented here.

If Petitioners are correct in their assertion here that the Fifth Amendment compels that every incident of a public project having an effect on the market

value of a property owner's remaining property is compensable where a portion is taken through eminent domain proceedings, then subsection (d) is unconstitutional to the extent it provides for the exclusion of community damages such as those asserted by Petitioners. Yet, at no stage of these proceedings, including motion for rehearing before the Texas Supreme Court, have Petitioners challenged the constitutionality of this Texas statute as applied in this case.

II. THE TEXAS SUPREME COURT DECISION IS IN ACCORD WITH DECISIONS OF THIS COURT INTERPRETING THE JUST COMPENSATION CLAUSE OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHERE THE DAMAGES PETITIONERS CLAIM TO THEIR REMAINING LAND RESULT FROM THE USE TO BE MADE OF THE LANDS ACQUIRED FROM OTHERS.

Petitioners claim damages to their remaining land as a result of the use to be made of the lands acquired from others. *Campbell* is the law of the land regarding

the applicability of the Fifth Amendment to the facts of this partial taking case. *Campbell*, 266 U.S. at 369-71. In *Campbell*, the United States took part of petitioner John Campbell's land. This Court acknowledged that the petitioner, "[b]ecame entitled to have the just compensation safeguarded by the Fifth Amendment to the Constitution; that is, the value of the land taken and the damages inflicted by the taking - such a sum as would put him in as good a position pecuniarily as he would have been if his property had not been taken. (Citation omitted.) But he was not entitled to have more than that." *Id.* at 371. The Court reasoned that he *was not* entitled to compensation for damages to his remaining land *by reason of the uses to be made of lands acquired from others for the same project*. The Court reasoned:

> [p]laintiff had no right to prevent the taking and use of the lands of others; and the exertion by the United States of the power of eminent domain did not deprive him of any right in respect of such lands. And, if the land taken from Plaintiff had belonged to another, or if it had not been deemed part and parcel of his estate, he would not have been entitled to anything on account of the diminution in value of his estate. *It is only because of the taking of a part of his land that he became entitled to any damages resulting to the rest. In the absence of a taking, the provision of the Fifth Amendment giving just compensation does not apply*; and there is no statute applicable in this case that enlarges the constitutional right. *Id.* (Emphasis added.)

Petitioners' reliance upon *Campbell* is misplaced; *Campbell* establishes the rule that the threshold of the Fifth Amendment is not crossed where compensation is claimed for diminution in value attributable not to the taking but the proposed use of the lands taken from others. *Id.* The point on which *Campbell* turns is not the indispensability of the

land taken for the public project, as argued by Petitioners, but whether the proposed use of the lands taken from others *constitutes a taking of the property owner's property. Id. citing Richards v. Washington Terminal Co.*, 233 U.S. 546, 554 (1914) (Emphasis added). In the case before the Court, fair market value of the part taken is the only damage the property owners suffer. Petitioners' claim for damages to the remainder is based *entirely* upon the proposed use of land belonging to or taken from others. In such circumstances the law is clear. This Court stated in *Richards*,

> [a]ny diminution of the value of property *not directly invaded nor peculiarily affected*, but *sharing in the common burden of incidental damages* arising from the legalized nuisance, is held not to be a "taking" within the constitutional provision. The immunity is limited to such damages as naturally and unavoidably result from the proper conduct of the road and are shared generally by property

> owners whose lands lie within range of the inconveniences necessarily incident to proximity to a railroad. *Richards*, 233 U.S. at 554. (Emphasis added).

The holding in *Campbell* is plain and well-reasoned:

> The rule supported by better reason and the weight of authority is that the just compensation assured by the Fifth Amendment to an owner, a part of whose land is taken for public use, does not include the diminution in value of the remainder caused by the acquisition and use of adjoining lands of others for the same undertaking. *Campbell*, 266 U.S. at 372.

Hence, the damages awarded to a condemnee precipitated by a taking are distinguished from the damages which may accrue on account of the public works or project for which the lands are taken. The Fifth Amendment applies only to the former.

III. THE TEXAS SUPREME COURT DECISION IS IN ACCORD WITH THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

As an initial matter, Petitioners grossly misstate the standard of review.[10] Petitioners argue for a heightened standard of review reserved for protected classes and cite *City of Cleburne, Tex.*[11] Although Petitioners correctly state the heightened scrutiny standard, heightened scrutiny is not applicable to this case. It is nowhere asserted, and could not be argued, that either party is within a class justifying heightened scrutiny. The appropriate rule is "that legislation is *presumed* to be valid and will be sustained if the classification drawn by the statute is *rationally related* to a legitimate state interest. *Heller v. Doe by Doe*, __ U.S.

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[10] Pet. at p. 14.

[11] *City of Cleburne, Tex. v. Cleburne Living Center*, 473 U.S. 432 (1985)

__, __ (1993), 113 S.Ct. 2637, 2642 (1993). (Emphasis added).

The Texas statutes which prescribe the evidentiary confines and the measure of damages in condemnation cases,[12] and which form the basis of the holding of the Texas Supreme Court below, precisely mirror the rules announced by this Court. Indeed, the holding of *Campbell* is exactly the holding of the Texas Supreme Court regarding §21.042(c); that is, "the effect of the condemnation on the value of the property owner's remaining property" includes those damages attributable to the acquisition, not those damages attributable to the use of adjoining lands of others for the same undertaking. *Campbell*, 266 U.S. at 371, 372. Similarly, the rule of *Richards* is exactly the same as §21.042(d) of the Texas

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[12] Tex. Prop. Code Ann. §21.042(b) and (c) (Vernon 1984) discussed *infra*. at pp. 13-18.

Property Code regarding community damages. *Richards*, 233 U.S. at 554.

Finally, Petitioners assert a perceived inequity involving the Texas statutory measure of damages for whole takings.[13] Petitioners assert, citing *City of Fort Worth v. Corbin*,[14] that a property owner whose entire tract is taken will recover its value, including its value attributable to visibility and accessibility. The landowner who owns property adjacent to a public project, but from whom no land is taken, is generally not entitled to compensation for damages attributable to those factors.[15] Though the rules are properly stated, they contribute nothing to Petitioners' argument from a constitutional standpoint. In the former

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[13] Tex. Prop. Code Ann. §21.042(b) (Vernon 1984).

[14] 504 S.W.2d 828, 831 (Tex. 1974)

[15] Pet. at 15.

circumstance there is a taking under the Fifth Amendment while in the latter there is not. The effect of Petitioners' argument on this point is to bolster the counterpoint. It is presumed by Respondents that Petitioners do not take the position in this Court that a landowner who owns property adjacent to a public project, but from whom no land is taken, should be entitled to Fifth Amendment indemnification for any loss occasioned by the project.

Contrary to Petitioners' characterization, the Texas statute as applied by its Supreme Court is in harmony with this Court's precedents. The proposed use by the State of Texas of its own highway right-of-way and of lands taken from others to widen it does not constitute a taking of Petitioners' property for which

compensation is due under the Fifth or Fourteenth Amendments.[16]

CONCLUSION

The decision of the Texas Supreme Court was based on Texas law. No federal issues were decided by or presented to the Texas Supreme Court. The state issues presented to the Texas Supreme Court were decided in accord with this Court's holdings in *Campbell* and *Heller* with respect to Petitioners' Fifth and Fourteenth Amendment issues, respectively.

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[16] Petitioners' reliance on *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) and *Lucas v. So. Carolina Coastal Council*, __ U.S. __, 112 S.Ct. 2886 (1992) demonstrates that they have missed the constitutional point. Petitioners confuse the compensability of negative effects of the taking on the property owner's remaining property (for which compensation is required under the Fifth Amendment) with effects on the property owner's remaining property caused by the taking of property of others for the same project (for which compensation is not required by the Fifth Amendment). Applying the rules of *Loretto* and *Lucas*, it is apparent that the diminution in value of Petitioners' remainder does not trigger a taking under the Fifth Amendment because it suffers neither a physical invasion nor a denial of all beneficial or productive use of the land.

Accordingly, this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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RE: Case No. D-1006
Style: STATE OF TEXAS AND CITY OF AUSTIN
v. ROBERT M. SCHMIDT AND RICHARD A. MASSMAN,
CO-TRUSTEES OF THE LEON A. SCHMIDT CHILDREN'S
TRUST NO. 1 ET AL.

Dear Counsel:

Today, the Supreme Court of Texas overruled the motion for rehearing in the above referenced cause.

Respectfully yours,

JOHN T. ADAMS, CLERK

_____

Peggy Littlefield
Chief Deputy Clerk

(3)

FILED
JUN 16 1994
OFFICE OF THE CLERK

No. 93-1761

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ROBERT M. SCHMIDT AND RICHARD A. MASSMAN
CO-TRUSTEES OF THE
LEON A. SCHMIDT CHILDREN'S TRUST NO. 1,
Petitioners,

v.

STATE OF TEXAS AND CITY OF AUSTIN,
Respondents.

PETITION FOR WRIT OF CERTIORARI

TO THE SUPREME COURT OF THE STATE OF TEXAS

REPLY TO BRIEF IN OPPOSITION

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28 pp

QUESTION PRESENTED
(In Reply to Brief in Opposition)

Does the Court have jurisdiction to address federal questions concerning a denial of Just Compensation if first raised in a motion for rehearing before the state supreme court if such compensation had never been denied in the history of the case until that highest state court's surprising decision?

QUESTIONS PREVIOUSLY PRESENTED
(Raised in the Petition for Writ of Certiorari - Restated)

Is the measure of compensation due for the taking of property under the Constitution's Fifth Amendment the value which would be negotiated for the sale of the property in an open market transaction between private parties?

Does the Constitution's Fourteenth Amendment permit the measure of just compensation due for the taking of property to differ among classes of condemnees dependent not on the damage sustained, but on the nature and extent of the public project involved?

LIST OF PARTIES

The parties to the proceeding below were: the Petitioners, Robert M. Schmidt and Richard A. Massman, Co-Trustees of the Leon A. Schmidt Children's Trust No. 1; Austex, Ltd., a Nevada Corporation, which has filed a separate Petition for Writ of Certiorari; and the Respondents, the State of Texas and the City of Austin.

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No. 93-1761

In The

Supreme Court of the United States

October Term, 1993

ROBERT M. SCHMIDT AND RICHARD A. MASSMAN,
CO-TRUSTEES OF THE
LEON A. SCHMIDT CHILDREN'S TRUST NO. 1,
Petitioners,

v.

STATE OF TEXAS AND CITY OF AUSTIN,
Respondents.

Reply to Brief in Opposition

I. THIS COURT HAS JURISDICTION

Respondents incorrectly argue this Court lacks jurisdiction over this case because the federal questions which form the basis of the Petition for Writ of Certiorari were not raised earlier than in the motion for rehearing before the State Supreme Court.[1] Additionally, Respondents incorrectly argue a wrongful denial of just compensation for a taking, as suffered by Petitioners, can be and here was founded on

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[1]Respondents' Brief in Opposition (hereinafter "Res. Brief") at pp. 2-5, wherein Respondents also concede the federal questions were raised in the motion for rehearing, at p. 2.

independent and adequate, substantive state law grounds.[2] However, this Court has repeatedly held that it has jurisdiction over cases where, as here, petitioners raise federal error immediately upon its occurrence. And there can never be independent and adequate, substantive state law grounds which can be used to deny a citizen federal constitutional guarantees. Any such substantive state law grounds must yield to the mandate of the United States Constitution.

Petitioners won this case before the state trial court and court of appeals. Each tribunal interpreted Texas law without offending federal constitutional guarantees. As the prevailing party at both levels, Petitioners had no basis to raise any points of error, federal or otherwise, complaining of either court's conduct. Only after the State Supreme Court surprisingly ruled against Petitioners' recovery of just compensation did Petitioners have reason and grounds to raise federal issues under the Fifth and Fourteenth Amendments which follow from such a denial. Only after the highest court in the state denied just compensation for the taking of property did the federal cause of action ripen. The first opportunity for Petitioners to raise these federal issues and the federal cause of action was in the motion for rehearing before the State Supreme Court. This is what Petitioners did, is all Petitioners could have done, and is all this Court requires.

Because the State Supreme Court decision denies federal constitutional guarantees and because it cannot and does not rely on independent and adequate state law grounds, this Court has jurisdiction.

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[2]Res. Brief at pp. 5-6 and 12-18.

A. Petitioners Raised the Federal Constitutional Issues Immediately Upon The Occurrence of the Grounds to Raise Them.

Petitioners did not and could not have raised any federal constitutional issues in this case prior to the Texas Supreme Court's decision because there were none to raise. The trial court and the Texas Third Court of Appeals both agreed with the landowner that all factors taken into account in the marketplace must be taken into account when assessing associated remainder property damage in partial takings cases. Both courts found the elements of damage in this case would be taken into account in marketplace negotiations and were not otherwise noncompensable. The State argued to the trial court and court of appeals that this measure of damages overcompensated Texas landowners--that the Texas Just Compensation Clause (the "adequate" compensation required of Art I, Sec. 17, of the Texas Constitution) did not envision such complete compensation. Significantly, this issue--the maximum extent of compensation available to Texas landowners--is strictly one of state law. As this Court noted in *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 294-295, 102 S.Ct. 1070, 1077 (1982), the Texas constitution may provide "arguably significantly broader" guarantees than the federal Constitution. In fact the Texas Just Compensation Clause is more broadly written than the Fifth Amendment and requires compensation for both takings and damagings. TEX. CONST. art. I, Sec. 17. Thus, when the issue is the maximum extent of just or adequate compensation, the issue is

necessarily one of state law.[3] This was the issue in this case at both the trial and appellate levels.

Federal issues did not arise until the Texas Supreme Court issued its opinion adopting a Texas standard for just compensation which so narrowly defined landowners' rights to just compensation in partial takings cases that it fell through the floor of minimum protection required by the Fifth and Fourteenth Amendments to the United States Constitution. Prior to this opinion, Texas courts had applied Texas law consistent with federal constitutional guarantees and Petitioners' recovery of remainder property damages, as shown in the state court of appeals opinion in this case. *State v. Schmidt*, 805 S.W.2d 25 (Tex. App.--Austin 1991), *reversed*, 867 S.W.2d 769 (1993).

The Texas rule for measuring remaining property damage in a partial taking case had been that established in *State v. Carpenter*, 126 Tex. 604, 89 S.W.2d 194 (1936). As the State Supreme Court wrote in *Schmidt*, "The rule in the *Carpenter* case, which is as settled as any in our jurisprudence can be, is the basis for the position taken by [Petitioners]." *State v. Schmidt*, 867 S.W.2d 769, 773 (Tex. 1993). The Texas Supreme Court set out the following rules from *Carpenter* for calculating remainder damages in partial takings cases:

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[3]For example, assume that the Texas Constitution's Just Compensation Clause is broader than the Fifth Amendment. Then, theoretically, a Texas appellate court could have reversed the *Schmidt* trial court's ruling on the just compensation issue and dictated a narrower, less protective standard which, nevertheless, was still broader than the protection provided by the federal Constitution. Thus, in theory, Respondents could have argued for a Texas just compensation standard, which, while narrower than the trial court and court of appeals standard, was still broader than the federal standard.

> ...[T]he damages are to be determined by ascertaining the difference between the market value of the remainder of the tract immediately before the taking and the market value of the remainder of the tract immediately after the appropriation, taking into consideration the nature of the improvement, and the use to which the land taken is to be put. ...[E]verything which affects the market value of the land itself, having due regard for past and probable future injuries, may be accurately reflected by ascertaining the difference in value, when all the legitimate testimony is properly submitted to the jury for consideration.
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> * * * * * *
>
> **Generally, it may be said that it is proper as touching the matter of the value and depreciation in value to admit evidence upon all such matters as suitability and adaptability, surroundings, conditions before and after, and all circumstances which tend to increase or diminish the present market value.** Evidence should be excluded relating to remote, speculative, and conjectural uses, as well as injuries, which are not reflected in the present market value of the property.

Schmidt, 867 S.W.2d at 772-773 (emphasis added), quoting from *Carpenter*, 89 S.W.2d at 197-198, 200. In deciding to ignore *Carpenter* and its requirement that just compensation mirror marketplace idemnification, the Texas Supreme Court chose to ignore revered state precedent upon which Petitioners had justifiably relied.

In order to reverse the trial court and court of appeals' application of Texas law to the facts of this case, the State Supreme Court further had to give new constructions to earlier case law and had to specifically disapprove two other state decisions which had supported Petitioners' recovery in this case. *Schmidt*, 867 S.W.2d at 777. In one of these two cases specifically disapproved, *Milam County*

v. Akers, 181 S.W.2d 719 (Tex. Civ. App.--Austin 1944, *writ ref'd w.o.m.*),[4] the disapproved holding earlier had been approved by virtue of the Supreme Court's denial for want of merit of a writ application filed therein. In the other, *State v. Buck*, 489 S.W.2d 642 (Tex. Civ. App.--Corpus Christi 1972, *writ ref'd n.r.e.*),[5] the Supreme Court earlier had found no reversible error.

This Court has consistently held that when a party could not reasonably have been expected to raise the federal issue prior to a motion for rehearing in the state court proceedings, that error is timely raised if raised in the motion for rehearing. *Missouri v. Gehner*, 281 U.S. 313, 50 S.Ct. 326, 327 (1930); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 678, 50 S.Ct. 451, 453 (1930); *Saunders v. Shaw*, 244 U.S. 317, 320, 37 S.Ct. 638, 639-640 (1917); and, *Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 86, 100 S.Ct. 2035, 2043 (1980). These cases stand for the proposition that this Court has jurisdiction to address federal error first raised on motion for rehearing before the state Supreme Court where (a) the decision of the state Supreme Court changes the rules on which a petitioner had been successfully relying in lower court proceedings, and (b) that surprising change in the law of the case is itself what first gives rise to federal error. In the subject case, federal issues did not exist until the Texas

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[4]The *Carpenter* rule was the basis for *Milam County*'s holding. *Milam County*, 181 S.W.2d at 722.

[5]The *Carpenter* rule was the basis for *Buck*'s holding. *Buck*, 489 S.W.2d at 646.

Supreme Court issued its opinion. [6] Petitioners' motion for rehearing raising the federal error was denied.

Respondents improperly rely on *Yee v. Escondido*, -- U.S. --, 112 S.Ct. 1522 (1992), to suggest Petitioners raised the subject federal questions too late in the proceedings. In *Yee*, the petitioners had throughout their litigation attempted to invalidate a local ordinance. The grounds raised to support their argument were based on a taking claim. It was not until after the state Supreme Court had ruled on that claim contrary to their position that the Yees sought to raise a due process claim. Since they were seeking affirmative judicial relief in trying to change local law, they had the burden to raise all their grounds timely. This Court correctly refused to consider the belatedly filed and supplementary due process argument since the Yees could have raised the argument earlier, and should have raised the argument earlier, but did not do so. In the subject case, Petitioners were the prevailing defendants in the trial court, could not and would not complain of judicial rulings in their favor, and were not put in the position of seeking relief from the appellate courts until the Texas Supreme Court ruled against them. Petitioners are not raising a late, supplementary argument to invalidate an application of Texas law which could have been raised earlier. Petitioners had no complaint with the application

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[6]Petitioners have not and do not argue that either Secs. 21.042(c) or 21.042(d) of the Texas Property Code are on their face violative of federal constitutional guarantees. Both can be applied constitutionally as did the trial court and the court of appeals when each supported Petitioners' recovery and when each found that the damages sought were compensable consequences of the taking and not community in nature.

of Texas law to the facts of their case until the State Supreme Court changed the law of the case and the interpretation of the statute.

B. Petitioners' Federal Cause of Action Did Not Ripen Until the State Supreme Court's Denial of Compensation

A federal cause of action did not exist prior to the Texas Supreme Court's decision which denied Petitioners the compensation awarded by the lower Texas courts. The black letter law of this Court is that no claim for just compensation under the Fifth Amendment exists until the highest state court has denied the landowner compensation. *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S.Ct. 3108, 3120-3121 (1985). Petitioners raised their federal Fifth Amendment claim or cause of action at the first and only time they could have done so in the state proceedings: on the motion for rehearing. Raising a Fifth Amendment claim earlier might well have been sanctionable.

C. The Texas Supreme Court's Decision Was Neither "Independent" of Federal Law Nor Based On "Adequate" State Law Grounds

1. Decision Not "Independent" of Federal Law Because It Was Interwoven with Federal Law.

Respondents incorrectly suggest the Texas Supreme Court's decision was based on "independent" state law grounds which will defeat this Court's jurisdiction. Even a cursory examination of the decision reveals this is not so. *Schmidt*'s central holding is in part IV of the opinion. *State v. Schmidt*, 867 S.W.2d 769, 777-779 (Tex. 1993). It is in this part of the opinion that the court holds that Texas

landowners are only entitled to remainder damages caused by the project if the property taken from them is "indispensable, substantial, and inseparable" from the project. *Schmidt*, 867 S.W.2d at 778. This holding is derived from federal law and centers on *Campbell v. United States*, 266 U.S. 368, 372, 45 S.Ct. 115, 117 (1924), and its Ninth Circuit offshoot, *United States v. 15.65 Acres of Land*, 689 F.2d 1329, 1332 (9th Cir. 1982). The reliance on federal law brings the subject case squarely within the rule this Court set forth in *Three Affiliated Tribes v. World Engineering*, P.C., 467 U.S. 150, 152, 104 S.Ct. 2267, 2276 (1984):

> [T]his Court retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law. In some instances, a state court may construe state law narrowly to avoid a perceived conflict with federal statutory or constitutional requirements. ... If the state court has proceeded on an incorrect perception of federal law, it has been this Court's practice to vacate the judgment of the state court and remand the case so that the court may reconsider the state law question free of misapprehensions about the scope of federal law.

The Texas Supreme Court's misperception of federal constitutional law as embodied in *Campbell* drove the *Schmidt* holding. Accordingly, this Court has jurisdiction to correct this misapprehension to assure compensation consistent with the Fifth Amendment. See also, *Michigan v. Long*, 463 U.S. 1032, 1040, 103 S.Ct. 3469, 3476 (1983) (Supreme Court will review cases where state court decision rests on, or is interwoven with, federal law).

2. Decision Not Based on "Adequate" State Law Grounds Because It Denies Federal Rights.

The *Schmidt* decision runs afoul of federal constitutional law. It is fundamental that a state court application of state law that violates federal law is reviewable by this Court. *Howlett v. Rose*, -- U.S. --, 110 S.Ct. 2430, 2437 (1990). Since *Schmidt* defines just compensation in Texas partial takings cases to be less than the minimum compensation required by the Fifth Amendment, *Schmidt* creates state law which violates the federal Constitution and diminishes federal rights. There can be no adequate state law grounds for violating federal constitutional guarantees. *Id.*, at 2439-2440.

II. RESPONDENTS HAVE MISCHARACTERIZED THE RECORD

The error of the Texas Supreme Court lies in the misguided measure of just compensation adopted when it failed to follow the marketplace valuation standard,[7] not in any failure to appreciate the factual nuances of this case. Nevertheless, Respondents have cast doubt on Petitioners' recitation of the facts by making two "exceptions" to Petitioners' reference to the facts giving rise to the diminution in value of the remaining property not taken. These exceptions are wholly without merit, as easily ascertained by reading the record.

Respondents represented to this Court there was "no evidence" of mountainous piles of dirt to be placed in front of Petitioners' property

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[7] *United States v. Miller*, 317 U.S. 369, 374 (1942); and *see*, Petition for Writ of Certiorari (hereinafter "Petition") at p. 7.

in connection with the project. Yet, photographs showing otherwise were admitted at trial as condemnees' exhibits nos. 9 and 16, some of which are attached hereto in the Appendix, at A-1 to A-7, infra. The dirt barriers shown,[8] incident to the project for which Petitioners'

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[8]While these photographs show construction activity only near the subject property (at time of trial such activity had not reached the subject), the State's engineer provided the evidence such piles would be in front of the subject:

Q: Some of the construction out there incident to this highway project where the utility relocation otherwise has already begun on Highway 183, hasn't it?

A: Yes. I think at the Burnet Road area. I'm not aware of any that has begun in the area in front of this property in question.

Q: But there is some that's at Burnet Road heading a little bit - maybe a little bit east towards this property; is that correct?

A: I believe that's correct.

Q: That's the same kind of construction that's going to move down the road all the way to I-35; is that correct?

A: **There will be construction all the way to I-35** [passing in front of the subject property], yes, sir.

Q: And it's the same kind of construction that we see there now?

A: Generally, part of the area up around Burnet Road was letting a separate contract. There are a number of specifications and requirements that are different on the project that is adjacent to the property in question.

Q: But we're talking about the same kind of construction equipment, same kind of utility?

A: Generally, yes.

Q: Okay. **While there are different specifications, visually it is going to be fairly the same; is that correct?**

A: **Yes.**

S.O.F. p. 142, l. 6 - p. 143, l. 6.

property was taken, are much more than sufficient to cause the diminution of adjacent property market value as found by the jury. Such had been conceded by Respondents. *Schmidt*, 867 S.W.2d at 773.

Respondents also contend that there is "no evidence" that after this project is completed the retail building on the remainder will appear as if "inside a cavern." Not only did the jury see large, scaled drawings of the effect of being immediately adjacent to a four story tall road structure (condemnees' exhibits nos. 1, 2, and 10), the jury heard direct testimony from a land planner expert witness who was the one who first made use of this "cavern" description and put it into evidence:

> Q: What about visibility from the property towards the main lanes, is that a factor?
>
> A: It's certainly a factor in the sense of what you have from a standpoint of what you had today versus what it would be in the future. The existing site today looks out over the - building looks out over an at-grade roadway, in this case, a six-lane roadway, and in the future it is going to be looking out at a - basically an elevated section with 120 feet below it, it's, for all practical purposes, like a **large cavern**.

S.O.F., p. 199, ll. 5-15.

By only challenging these two of the many factual representations made by Petitioners regarding the evidence presented at trial, Respondents concede the truth of the others.[9] As shown above, there was no basis to challenge any of Petitioners' factual representations. What the evidence shows is that Petitioners' remaining

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[9]Petition at pp. 3-4.

property after the taking was severely damaged by virtue of the project for which the taking was necessary. The damages suffered by Petitioners were suffered for the shared community's benefit. The Fifth Amendment provides Petitioners the guarantee that the community will similarly share in the cost.

CONCLUSION

This Court has jurisdiction to consider this case. Federal error was raised at the first appropriate time, the motion for rehearing before the State Supreme Court. Up until that point, Petitioners had been the prevailing party and there was no error of any kind of which to complain. Not until the decision of the State Supreme Court, which ignored or disapproved established state precedent, was there a federal issue or a ripe claim for the taking of property without just compensation. There can be neither independent nor adequate substantive state law grounds to deny a citizen rights guaranteed by the United States Constitution.

Not only does this Court have jurisdiction to consider this case, it should grant review on the merits. Petitioners reurge the reasons given for granting the writ.[10] This Court has recently provided guidance as to determining when compensation is required by writing on what facts give rise to a taking, but guidance is still needed on the measure of compensation when a taking is admitted. When a property owner's land is damaged through the construction or operation of the public project, with no associated taking of all or a portion of that land,

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[10]Petition at pp. 6-21.

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[10]Petition at pp. 6-21.

there is no automatic entitlement to compensation. That landowner must first establish liability through successfully proving that a taking occurred in an inverse condemnation action in order to recover. When a property owner's land is partially condemned for the public project, a taking is established as a matter of law. Liability is admitted and is not at issue. The only issue present in such a situation is the proper measure of damages and that is the issue now before this Court. Petitioners argue this measure is constitutionally tied to indemnification as would occur in the marketplace.[11]

The difference between a landowner who receives compensation and one who does not depends on the ability of each to establish a taking. In the subject case, the taking is admitted. Compensation measured by the consideration that would be received in the marketplace provides justice and constitutionally guaranteed relief and protection and must not be denied Petitioners.

Respectfully submitted,

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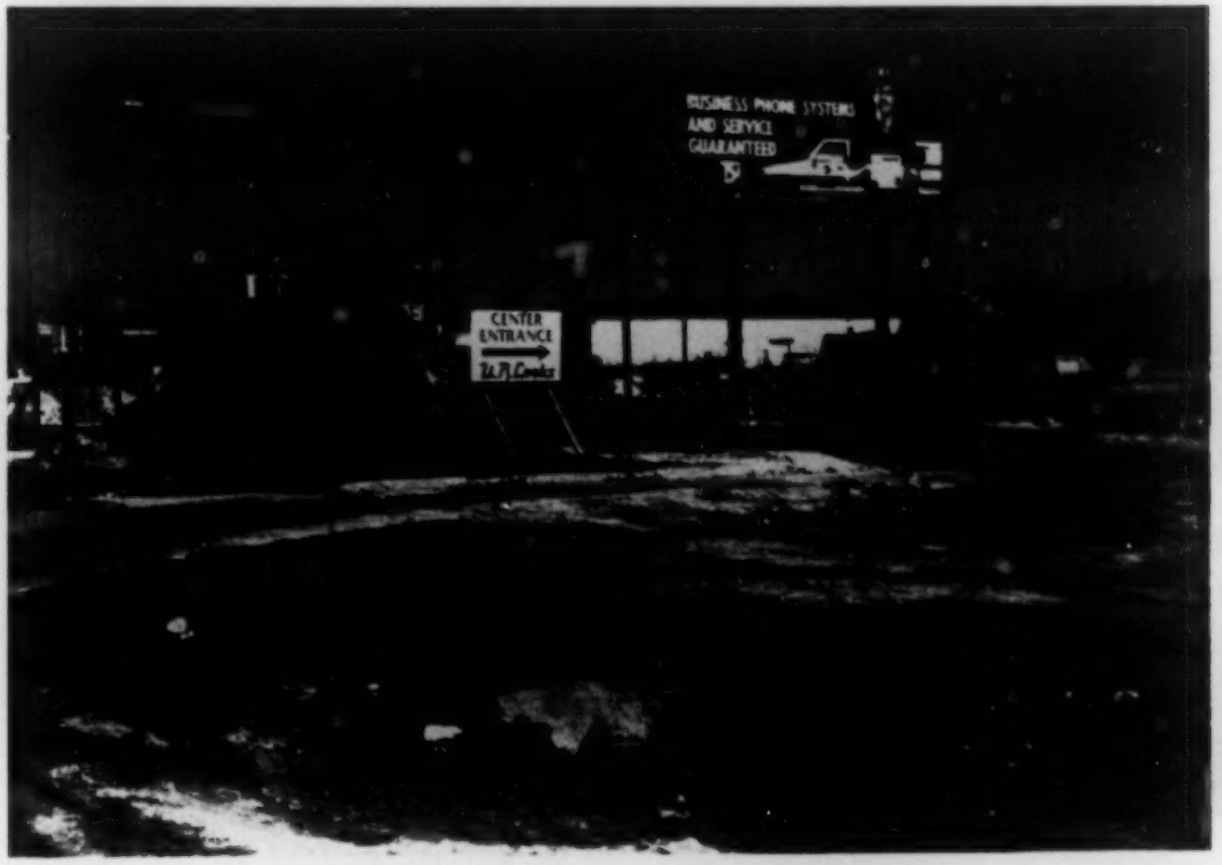
[11] See text and case law in Petition at p. 7.

PHOTOGRAPHS TAKEN FROM

CONDEMNEES' (PETITIONERS')

TRIAL EXHIBIT NO. 9

A-2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AND SERVICE
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CENTER
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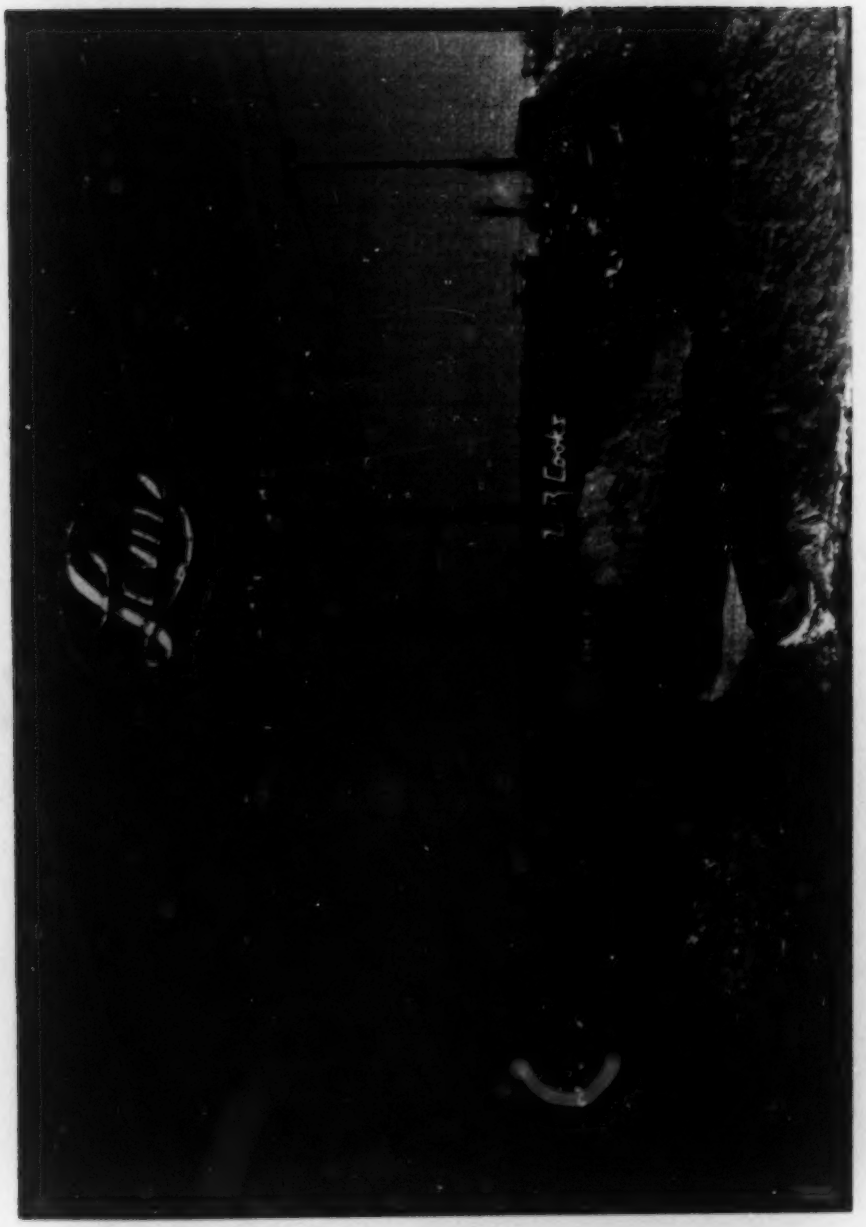
W.R. Cooks

A-4

LEASING
328-4064
ARCHER



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